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MANUAL OF MASSACHUSETTS EMINENT DOMAIN APPRAISAL LAW

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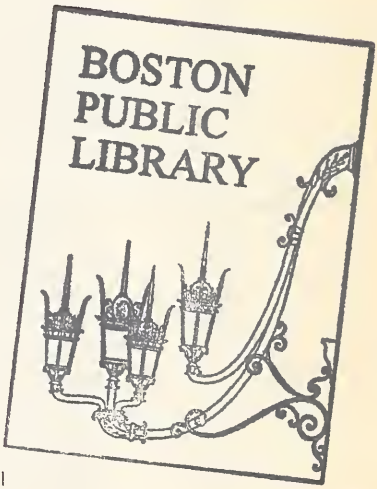
September, 1965



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MANUAL OF MASSACHUSETTS EMINENT DOMAIN APPRAISAL LAW

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FOREWORD

This manual has been prepared to disseminate more widely the fundamental law of Massachusetts upon which must be based appraisals of damage to property resulting from exercise of the sovereign power of eminent domain. It is intended to supplement the general knowledge of engineering principles and real estate markets, which are essential to accurate and effective appraisals. In addition it may be helpful in the evaluation of advice given by consultants, including appraisers retained by those with the responsibility for ordering the taking of private property.

The sovereign power of eminent domain must be exercised often for the benefit of all citizens to create highways and other means of mass transportation, schools, parks, and many public improvements. Simple justice requires that those who order property taken by eminent domain minimize the hardship imposed on an individual citizen. The 1964 amendments to Chapter 79 of the General Laws which I had the honor to propose to the Legislature, established accelerated and enforceable procedures for the prompt payment of damages. Two fundamental 1964 statutory additions to the law include requirements that awards for damages by taking authorities be voted at the time of the adoption of the order of taking and that they be based on appraisals made for that purpose.

The responsibility of a taking agency to pay promptly damages in fair and reasonable amounts is balanced by the duty to all citizens to pay no more.

Successful achievement of that dual objective must be based on realistic and legally sound appraisals. Appraisers must be mindful of the possibility that fulfillment of their duty to the general public may result in litigation requiring them to testify in support of their opinions in court trials. This manual is intended to provide appraisers with the fundamental knowledge of applicable law which will permit them to meet such a challenge with opinions well founded in law and fact.

In many respects the law of Massachusetts governing the appraisal of land-taking damages is clear. On those points where the law is not well settled standards are presented for the guidance of the appraiser. Not included herein are those unique problems which arise so infrequently that lengthy expositions thereon in a publication of this sort would detract from its purpose. Appropriate officials of the Commonwealth may request the formal opinion of the Attorney General in such unusual cases as they occur.

The law must adapt to changing circumstances in its constant protection of fundamental and constitutional rights. The process of clarification of some aspects of the law never ceases. This manual is based on judgments about applicable rules of law made, perforce, at the time it was written. In certain areas developments will occur that must be acknowledged by appraisers in the performance of their duties. The format of this manual has been selected to facilitate its amendment when necessary. Maximum physical durability has been sought at minimum cost for it is expected that this manual will be used often in the field.

It is with pleasure that I gratefully acknowledge the contributions made by the staff of the Eminent Domain Division of the Department of the Attorney General—to Assistant Attorney General Henry G. Weaver, Jr. who prepared the first complete draft of the manual, to Special Assistant Attorney General James E. V. Donelan for comprehensive research with the assistance during the Summer of 1964 of Legal Interns Allan Ashman and Robert G. Tetler, to Legal Assistant Margaret W. Lamb and Special Assistant Attorneys General C. A. Peairs and Robert L. Meade for editorial work, and finally to Assistant Attorney General John S. Bottomly who served as editor of the entire publication and who wrote this edition.

State House
Boston, Massachusetts
August, 1965

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Attorney General
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CHAPTER ONE

INTRODUCTION

§1.1 The Power of Eminent Domain

All governments have the power to take private property by eminent domain for public purposes without the consent of its owner. That power is inherent in every sovereign. In Massachusetts and the United States of America the Constitutions which reduce that power to writing include equally forceful requirements that the citizens whose property is taken must be compensated for the loss.

§1.2 The Public Purpose

Often the use of the power of eminent domain is one of the first overt acts by a government to carry out a public improvement which has been considered and planned for some time. Through an enabling statute the appropriate agency of government will have had delegated to it the authority to take private property for a specific purpose or purposes. Prerequisite to the valid exercise of that power is that the private property be taken for a public purpose. Juducial and statutory definition of "public purpose" is not static, but adapts to those functions of government considered necessary for the benefit of all. In relatively recent years the definition has expanded beyond the traditional to include such activities as urban renewal by a combination of local, State and Federal governmental agencies.

§1.3 Determination of Compensation

Of equal importance is the determination of the fair compensation to be paid to the owner of the property at the time of the taking. Chapter 79 of the Massachusetts General Laws requires that the taking authority must vote an award of damages in a fair and reasonable amount at the time it adopts an order of taking on the basis of appraisals prepared to assist it in making that judgment. If the owner whose property is taken does not consider the award of the taking agency to be adequate, he may file a petition for the assessment of damages by the Superior Court for the County in which the land is located. From the time that first consideration is given to a taking it must be borne in mind that a significant part of the judicial defense of the award of damages voted by a taking agency will be the testimony of those appraisers retained by it and whose opinions it approved and adopted.

This manual deals primarily with substantive law. The procedural aspects of the determination of fair and reasonable damages is considered herein only tangentially. For ease of reference on procedural matters pertinent portions of the General Laws are included in the Appendix hereto. In that connection it is important to note that Chapter 79 of the General Laws is procedural only and creates no substantive law. The right to compensation for damages arising from the taking of property by eminent domain derives from the Massachusetts and United States Constitutions, pertinent portions of which are also included in the Appendix hereto. It is therefore a prerequisite to proper performance of his duty for an appraiser to have a thorough understanding of the general or special law authorizing specific public improvements. Such knowledge is vital, for example, when considering damages arising from circumstances referred to in §9 of Chapter 79 of the General Laws.

§1.4 Exercise of the Power

Exercise of the power of eminent domain in its most simple form consists of the outright acquisition by the government of a tract of land and the termination of all private rights therein. At the other extreme are eminent domain cases involving no physical taking of private property, but only injury through the acts of a government agency on nearby land. Between those two extremes are intermediate types, based on the takings of only part of the physical area or of part of the rights in real property.

§1.5 Organization of Manual

The fact that the appraiser will encounter all types of eminent domain cases forms the basis of the organization of this manual.

Classification of interests in real property are included in Chapter Two. Rights of others in property are considered in Chapter Three. Compensation for property, whether taken in whole or in part, is dealt with in Chapters Four through Six.

The effects of eminent domain activities on property not taken, whether or not a partial taking occurred, are considered in Chapters Seven through Ten.

Consideration of partial takings of land or property rights are perforce included in all Chapters.

§1.6 Two Fundamentals of Sound Appraisal

The two elements of a sound appraisal are an accurate factual basis and the application thereto in conformity with law of those principles of valuation which will establish damages at a fair and reasonable amount. Employment of those two fundamentals in land-taking cases is analyzed in detail in Chapters Two through Six of this manual.

§1.7 Purpose of the Appraisal

The purpose of the eminent domain appraisal is to determine an amount of compensation which is fair both to the owner and to the public. The quality of the appraisal depends to a large extent on the legal soundness of the method the appraiser uses to arrive at his conclusion.

§1.8 The Written Appraisal Report

The written appraisal report must contain a great deal more than the conclusion of the appraiser. It must include not only **all** of the facts on which that value judgment is based, but a careful exposition of the reasons for the application thereto of one method of measuring damages rather than another. In some cases an appraiser may properly and prudently evaluate the facts by more than one method in the same report. The legal and logical validity of a careful presentation of the method by which an appraiser arrives at his valuation may often be as important as the valuation itself.

§1.9 Necessity of Thorough Documentation

Documentation in support of the reasoning process of the appraiser is essential to intelligent and deliberate consideration of the conclusions of the appraiser, be it by the taking agency or by a court of law. In those instances where it is not required by law in Massachusetts, taking agencies should and in many cases do require thorough documentation as a matter of sound administrative practice. To minimize the cost to the citizens of the Commonwealth officials must recognize that the availability of Federal funds often depends on adequate documentation in the appraisal report.

§1.10 Ultimate Test of an Appraisal

The appraiser must always have in mind the possibility of attack on his appraisal in a court proceeding. He must be prepared to defend his conclusions by careful presentation of the facts and principles of valuation upon which his conclusions are based. The fact that such a confrontation may occur some time after the actual taking of the property, when the matter is no longer fresh in his mind, increases the significance of the well-documented appraisal report. It must also be noted that careful and thorough initial appraisals, establishing damages in fair and reasonable amounts, will assist the taking agency in persuading the former owner that litigation would be an unproductive and possibly detrimental expense.

CHAPTER TWO

CLASSIFICATION OF INTERESTS IN REAL PROPERTY

§2.1 Terms of the Order of Taking

Rule 1. ***The amount of physical property and the type of legal interest therein are described by the terms of the order of taking.***

The order of taking contains a statement of a physical description and the amount of property being excluded from the taking. The order also indicates the type of legal interest taken in the property. That may be total ownership of the entire title to the property. It may be an easement consisting of the right to use the property in some specified, limited way with all other rights in the property remaining in the owner at the time of the taking. The taking of an easement including only a portion of all of the rights in the property is a partial taking, considered in Chapter Seven.

§2.2 Silent Order of Taking

Rule 2. ***In the absence of provisions to the contrary in the order, a taking by eminent domain includes title to***

(a) The land,

(b) Improvements on the land, and

(c) Easements appurtenant to the land.

The order of taking generally states whether or not trees and structures are included in the taking. However, usually it does not include any further details.

When there is no contrary provision in an order of taking, it affects only real property. The appraiser must distinguish carefully and precisely between real and personal property. The application of the rule appears from the following example:

> A landowner has a plot of land on which he operates a filling station. He also has an easement or right of way over neighboring land owned by someone else which he and his customers use to pass between his property and the street.

Under the provisions of the usual order of taking the following conclusions would be correct.

> The land is taken including not only its surface, but the subsurface below it and the air space above it.
>
> The business on the premises is not taken. The order effects only the real estate. The business is not real estate. Though the landowner is deprived of the filling station operation at this location including all his customers, good will and future profits, unless he can obtain a new site nearby, he is not entitled to compensation for such loss of business. The rationale for this Massachusetts law is that theoretically the owner of the business may re-establish it elsewhere.
>
> Improvements on the land are taken. They include the gasoline pumps and tanks, as well as any building or buildings which the owner has constructed on the land. While such property was built as part of the business operation compensation must be paid for their taking because they are also tangible pieces of real property.
>
> Personal property on the land is not taken. The inventory of gasoline, for example, unlike the tanks in which it is stored, is not part of the real estate. Such a liquid can be moved with ease. However, even if personal property cannot be removed and is lost or destroyed in the taking, the owner can recover no compensation for it.

The easement leading to the street is considered to be taken even if the land over which it lies is not taken. The whole purpose of the easement is to facilitate use of the land which is taken. The easement belongs to that land. It is appurtenant to the taken land. The taking of the land to which the easement is appurtenant destroys the purpose of the easement. For that reason the easement is lost with the taken land. The owner is entitled to compensation, whether or not the order of taking mentions the easement.

In the foregoing example, the property taken includes:

(a) The land,

(b) Improvements on the land, and

(c) Easements appurtenant to the land.

These three facets of the taking are discussed further in the sections immediately following.

§2.3 Valuation of Land

Rule 3. ***Valuation of land taken by eminent domain must include consideration of its shape and size, condition and appearance, terrain or topography, and subsurface.***

The land taken may be reasonably compact, or very irregular. Its shape may be the biggest single factor in making the property ideally suited to some uses and completely unsuited to others. The size and dimensions of the property, including its area, its depth or average depth, and its frontage are vital factors in determining highest and best use and value.

The land may be developed or undeveloped, well-maintained or run down. It may be generally attractive or unappealing. All are important in determining value.

The terrain or topography of the land should be given careful consideration. The land may be high or low, dry or swampy, level or rolling, flat or sloped, wooded or barren. It may have a combination of these and other features. They should all be noted and considered as bearing on the questions of use and value.

The type, character and condition of the soil are most important in appraising farm or pasture land. They may also be important for purposes of lawns, gardens and trees for residential property and industrial parks.

Vegetation, of course, is an important part of the terrain. Its character, extent and condition should be considered whatever may be the type of property taken. Most vegetation, including lawns, shrubbery, growing crops, standing timber, and nursery stock, is part of the real estate and compensable. Such vegetation usually is not appraised on the basis of its sale price if removed from the land. It is considered to the extent that it enhances the value of the land by being a part of it. The quality, extent and marketability of such items, however, may be considered as bearing on the question of uses to which the property is adaptable.

When vegetation, including crops or timber is cut or removed, it ceases to be part of the real estate and becomes personal property. That is also the case when vegetation has been sold in place to some third person. When crops have matured they are no longer part of the real estate.

Any pond or watercourse on taken land is considered a part of that land. It may improve the appearance of the land or enhance its value for industrial, agricultural or recreational purposes. It may indicate the presence of low, wet land, tending to reduce value because it must be filled if the property is to be put to its highest and best use.

The effect of flowing or standing water on available uses and value of the land depends on many factors. Width and depth, general appearance and degree of cleanliness or pollution should be considered. The water bed may be of sand, mud, or rocks. There may or may not be a useable beach. In the case of a brook or stream, rate of flow may be important.

Some subsurface waters have no well-defined channel or direction of flow. They are called percolating waters, to distinguish them from subsurface streams, which have a well-defined

channel and direction of flow. Percolating waters are the absolute property of the landowner and are considered part of his real estate. Takings of percolating waters are compensable to the extent that their amount and quality increase the value of the land as a whole. Such waters continue to be part of the real estate even when they are gathered in a well on the property. Removal of such water from a well converts it into personal property, eliminating its compensability.

A small pond located entirely within the bounds of the taken real estate is usually the property of the owner of the surrounding land. If it is within the area described in the order of taking rights therein pass to the taking agency in the same manner and at the same time as the land. The landowner also has title to fresh-water brooks and streams which come to the surface for the first time on his property and which have no outlet except to publicly owned waterways.

In other respects the rights of an owner of land are limited by the rights of other landowners through whose property the watercourse flows and in some cases by rights of the general public. A watercourse is taken from the landowner only to the extent that he has rights in it. Limited water rights are in the nature of easements rather than complete ownership. They are considered in §2.53.

The subsurface is as much a part of the real estate as the surface. A subsurface of quicksand or some other soft and unstable substance may make the land unsuitable for building. An extremely hard subsurface may mean that excavation would be difficult and costly. Such factors could have considerable bearing on the value of the land as a whole.

The appraiser should consider the existence and extent of subsurface or surface mineral deposits. Ore, stone, sand, gravel, peat, loam and other such deposits may have a considerable effect on value. If they are present in marketable quantities the appraiser may be justified in concluding that the highest and best use of land would be a quarry or mine. The appraiser should regard such deposits in place as enhancing the value of the land as a whole. Their presence may require retention by the taking agency or the appraiser with general responsibility of an expert in the valuation of such deposits in place.

Removal of mineral deposits from the ground converts them into personal property because of separation from the land. The extracted mineral may then be considered only as it may relate to the question of available use, but not to increase the value of the land itself.

§2.4 Valuation of Improvements

Rule 4. ***An improvement on land taken by eminent domain is compensable only if it***

(a) Increases the value of the land by enhancing its highest and best use; and

(b) Is a part of the real estate.

While improvements on the land are a part of the real estate which may be taken and for which payment must be made, the amount of compensation therefor is not determined by the value of improvements as separate items, independent of the best available use of the land. Improvements are integral parts of the real property, which add to the value of that land for the use to which it is best suited. Compensation for damage to them as a result of a taking is measured on that basis.

An improvement may add nothing to the value of the land for its highest and best use. For example, a stable on a city lot may have no value in connection with the land on which it is built. In that case the landowner would not be entitled to compensation for the stable. This is true no matter how well built the stable may be and no matter how much it might cost to build a new one.

An improvement may detract from the value of land. If the highest and best use of the land is a parking lot, for example, any structure on the land which interferes with that use would have to be removed. A purchaser desiring to use the land as a parking lot would reduce the price he

was otherwise willing to pay for the land by the cost of demolition. If that property were taken by eminent domain, a similar reduction should be made in its value at the time of the taking.

§2.41 Improvements Which are Part of the Real Estate

Rule 5. ***The principal criteria used in determining whether or not an article of property is part of the real estate are***

(a) The nature of the article of property,

(b) The manner of its attachment, and

(c) Its purpose.

The only improvements which are compensable are those which are part of the real estate. The appraiser must therefore distinguish between real estate and personal property.

Any improvement on land was at one time personal property. A house or office building at some point consisted of unrelated amounts of lumber and brick and other materials. When those are brought onto the land and built into a structure, they become part of that land. This part of real estate is called a fixture.

Fixtures include anything that ordinarily passes as a part of a deed conveying real estate. A house on land sold will ordinarily pass to the purchaser under the deed. It is therefore a fixture. For the appraiser of damages arising from a taking by eminent domain that rule is binding despite any provision in a particular deed excluding the house from its operation. Such a clause in a private agreement has no effect when the land is taken. The same vitiating rule applies to contract provisions otherwise giving a lessee or a conditional vendor the right to remove certain items from premises. If an improvement would normally pass as part of the real estate in the absence of such a special deed or contractual provision, it must be appraised as real property.

In deciding whether a given article of property is a fixture the appraiser must give particular consideration to:

(a) The nature of the article of property,

(b) The manner of its attachment,

(c) Its purpose.

§2.411 Nature of the Article of Property

By their very nature, many items are ordinarily left permanently in place once they are installed on the premises. For example, doors and windows in a building, though movable, are usually intended to be permanent parts of a building. Other items, though attached to a building, are generally thought to be more transitory. Should the landowner move out, he would be expected to take them away. Heavy articles of furniture such as bureaus and beds ordinarily fit in this category and are considered personal property.

§2.412 Manner of Attachment

The more firmly an article of property is attached to the land or to a building, the more likely it is to be part of the real estate. Machinery embedded in concrete or otherwise securely attached will ordinarily be considered a fixture. However, if it is held in position only by its own weight, no matter what its size, it may be considered personal property.

An article which cannot be removed from the real estate without serious damage to it or to the realty usually is considered a fixture. Under some circumstances an article can be removed without damage, but it is considered a fixture because moving creates significant difficulties such as removing a door or dismantling the article. If an article of property is rendered useless by removal from real estate that article is considered a fixture because it has lost its functional purpose and value.

§2.413 Purpose Served by the Article of Property on the Premises

When an article of property is placed in a building to carry out the purpose for which the building was intended and to increase permanently its value for occupation and use, that article thereby becomes a fixture. This is true regardless of what kind of article it is and how it is attached.

One test of purpose is whether or not the article is essential to the use of the real estate. If it is functionally essential then it is usually considered a fixture. Another test is whether the article was specially designed to fit in the building or whether the building was specially designed to house the article. A custom-built bookshelf designed to fit precisely into a particular alcove in a room is more likely to be part of the real estate than an ordinary bookcase. The special design for the specific portion of the building suggests that the article is a fixture.

Application of the above standards classifies a number of articles of property as fixtures or personal property for purposes of most cases. The classifications will apply generally. However, there are exceptions to which the appraiser must be alert by observing any peculiarities in articles of property on the taken premises. The classifications that follow apply only to articles which are typical of their kind.

§2.414 Examples of Articles Real or Personal Property

Buildings: A building is ordinarily part of the real estate. Exceptions are structures designed to be portable such as quonset huts or house trailers. A building on property is usually the most important and valuable improvement on the land. Any building should be examined with care. Proper examination begins with consideration of the general characteristics of the building and their inter-relation, such as:

- Age and condition
- Use or uses
- Style, layout and design of exterior and interior
- Dimensions of exterior and interior including each floor and each room
- Appearance of exterior and interior
- Location with reference to lot boundaries and other structures on the premises
- Foundation or method by which it is attached to realty
- Structural materials including the type, age and condition of each
- Number of stories
- Number of rooms on each floor and total for building

The type and condition of each of the following parts of the building must be examined:

- The roof including its covering, eaves, spouts and conductors
- Ceilings
- Chimneys, dampers, fireplaces and flues
- Walls of the exterior and interior including structural materials, wall covering, such as wallpaper, and woodwork, such as cornices, mouldings and mantles
- Insulation or its absence
- Doors, exterior and interior
- Windows and shutters
- Door and window screens
- Storm doors and windows or their absence
- Porches, bay windows and ells
- Floors and floor covering including linoleum, plastic or other finish, and wall-to-wall carpeting, but not including ordinary rugs and throw carpets
- Steps and stairs, their railings or bannisters
- Elevators and elevator shafts

Unless specially designed and securely built in, furniture and furnishings are not part of the real estate or the building. They are therefore not compensable. Electrical equipment may be either real estate or personal property. When it is attached more securely than merely by a cord plugged into a wall socket, electrical equipment is considered part of the real property. Examples thereof are:

- Dynamos and generators
- Wiring
- Chandeliers and wall lighting fixtures
- Fans installed in wall or ceiling, but not fans which merely rest on the floor or a table
- Switchboards

Examples of electrical equipment considered personal property are:

- Floor and table lamps
- Air conditioning units, unless built in as part of a central system
- Refrigerators
- Stoves
- Radio and television sets and aerials
- Heaters
- Dishwashers
- Washing machines
- Electrical equipment used for manufacturing involves special problems, discussed below under "Manufacturing Equipment"

The heating system is ordinarily part of the building and therefore part of the real estate. Plumbing equipment attached to a building is for that reason ordinarily considered part of the real property. Manufacturing equipment has such variety that it is difficult to generalize about classification of it as real or personal property. Equipment used to produce the motive power to operate other machinery and equipment in a factory is usually regarded as part of the real estate including:

- Engines
- Boilers
- Mill wheels
- Steam pumps, gauges, and other accessories, attached to the above and necessary for their safe operation
- Shafting, belting and gearing by which the above items are attached to other machinery

Machinery, firmly attached to the foundation, floor or wall of a factory, or to its power works, is considered part of the real estate. Equipment, held in position merely by its own weight or attached only for the purpose of steadying it for use, is ordinarily personal property. Small machines and equipment, not securely attached, are normally personal property. Raw materials used for fuel or power, such as coal, or for making the product, such as iron and steel, are personal. This applies to bulky machinery and equipment to be combined with other parts in an assembly process. Exterior improvements, usually considered part of the real estate and therefore compensable, include:

- Streets and walks
- Steps
- Driveways
- Railroad tracks and ties
- Posts and poles
- Gates and entranceways

- Signs, if built in with the appearance of being permanent
- Wires, overhead and underground
- Outdoor grilles, if built in
- Filling station pumps
- Outdoor fountains and pools
- Bridges and bridge abutments
- Railings
- Dams and breakwaters
- Wharves, piers and docks
- Wells and water pumps
- Manholes, covers and ladders
- Sewers and cisterns
- Underground lawn sprinklers
- Underground tanks
- Underground pipes, drains and conduits

§2.5 Easements Appurtenant to the Land

Rule 6. ***The loss or destruction of a right to use land other than that described in the order of taking is compensable only if***

(a) The right of use is an easement, not merely a license or personal right; and

(b) The easement is appurtenant to the land taken.

The owner of taken land may have rights to use other land that are not mentioned in the order of taking but the value of which is related to the taken property. For all practical purposes such rights to use lose their value because of the taking. If such rights in other land constitute a so-called appurtenant easement, they are regarded as a part of the land taken. The owner is entitled to compensation for the loss or destruction of the easement. The appraiser must know whether such rights in other land amount to an appurtenant easemenet or some other type of right. That depends upon the two important distinctions discussed in the following §§2.51 and 2.52.

§2.51 An Easement Distinguished from a License and a Lease

An easement is a right to use or enjoy land which belongs to another. One common type of easement is a right of way to reach the property owned by the holder of the easement.

An easement is an interest in land such as a mortgage or a lease. It is ordinarily created and transferred by deed. It is not extinguished by the conveyance to a new owner of the land which it burdens.

To distinguish an easement from a mere license to use the land of another owner may be difficult because a license may permit the same sort of use by the licensee as would an easement. A license is a personal or contract right. It is not an interest in land. It can be created and transferred without a deed and sometimes even by oral agreement. It is nothing more than a temporary personal arrangement with the present owner of the land which it affects. Ordinarily the existence of a license ends upon the conveyance of that land to another owner.

A taking which involves the destruction of a mere license does not entitle the licensee to any compensation therefor. There can be no compensation for the loss or destruction of purely personal or contractual rights. Compensation is paid only for interests in real estate. In addition to licenses to use other land, options to purchase, contracts with employees, suppliers or customers, and any other type of purely personal agreement are not compensable.

Though there may be a lease involved it is ignored when taken property is appraised. This rule applies though the lessee may later receive a share of the compensation for the property

taken and though a lessee may bring a petition for assessment of damages under Chapter 79 of the General Laws. An appraisal must include damages to all of the property rights taken of which a lease would be a part of the whole. A lease of property other than that taken is never considered in appraising damages arising from the taking. A lease is never "appurtenant" to land other than that covered by the lease.

§2.52 An Appurtenant Easement Distinguished from an Easement in Gross

Most easements are created for use in connection with a particular parcel of land owned by the beneficiary of the easement. Such an easement is said to be appurtenant to the other land with which it is used. For example, a right of way leading from a tract of land to a public street is appurtenant to that tract of land. Such an easement belongs to the land to which it pertains. It continues to be a part of that land regardless of any change in ownership thereof. An easement ordinarily adds to the value of the land to which it is appurtenant, but has no value independent of that land. Therefore, when land to which an easement is appurtenant is taken, the easement is thereby taken or destroyed, whether or not the taking agency intends to take the easement.

Some easements are not appurtenant to any land, but exist for purposes other than to serve adjoining land. Such a non-appurtenant easement is called an easement in gross. An easement in gross is not destroyed by the taking of other land. No compensation is paid for an easement in gross unless the land on which the easement lies is specifically included in an order of taking.

§2.53 Easements in Waters and Watercourses

Rule 7. ***The rights of a landowner in a watercourse or body of water on or adjoining his property depend upon***

(a) The ownership of the waterbed; and

(b) Whether or not it is navigable.

Many watercourses and bodies of water occupy or are adjacent to the land of more than one person. In that circumstance the rights of the landowner whose property is taken are subject to similar rights in other landowners over whose property the water flows. In many cases there are also certain water rights which may be exercised by members of the general public, whether they own any land or not, or by the government in their behalf. In such instances the rights of the owner of the land taken are further limited by those public rights. The rights of other landowners and of the general public in a watercourse or body of water on the land taken are discussed in §3.21.

The purpose of this section is to explain the rights of the landowner whose property is taken. Though the expression may not always be technically correct, these rights can be best understood as easements appurtenant to his land. These private rights of a landowner depend on whether or not:

(a) He owns any portion of the waterbed; and

(b) The water is navigable.

Unless he owns at least part of the bed underlying the water, the landowner has no private rights in the water. For that reason there are ordinarily no private rights in the greats ponds of Massachusetts. A great pond is one covering an area of ten or more acres. The water and land underlying great ponds are both owned by the Commonwealth. A private landowner contiguous to a great pond owns no part of the bed and therefore has no private rights in the water. A taking agency of the Commonwealth may drain a great pond without creating any obligation to compensate a landowner.

In the case of coastal waters and other waterways affected by the ebb and flow of the tide, the adjacent private landowner generally owns that part of the bed which lies between the high and low water mark, often referred to as the flats. The channel of a watercourse is that part of the waterbed below low water mark. It is usually owned by the Commonwealth. Private rights in tidewaters do not extend beyond the flats.

Small ponds and streams not affected by the tide are privately owned in most cases. If one owns property on both sides of such a watercourse, he owns the entire width of the bed between the parcels of land. If one owns land only on one side, he also owns the waterbed to the center of the channel or pond.

If a waterway is navigable, the rights of the landowner are limited by rights of the general public. As used herein, the word navigable means capable of use for shipping and boating.

Rules 13 through 19, below, summarize the most important rights a landowner has in waters and watercourses when he owns some part of the waterbed. This discussion is limited to private rights. A landowner is also entitled to use such a watercourse or body of water in other ways, but only as a member of the general public. Though he is not entitled to compensation for the loss of such public rights, the fact that he has them may increase the value of his land indirectly.

§2.531 Right of Access

Rule 8. ***A landowner has a right of access between that portion of a waterbed owned by him and adjacent waters; provided, however, that if the watercourse or pond is navigable, such access may be obstructed by the Commonwealth without compensation in order to protect or improve navigation.***

If the waterway is not navigable or is not affected by the tide, an adjacent landowner has an exclusive, private right to fish in the water flowing over the part of the waterbed owned by him. If it is navigable or affected by the tide, he has no such private right. He does have the same right as any member of the general public who may fish over his part of the waterbed in a navigable or tidal body of water.

For purposes of eminent domain the right of fishing includes only the right to use the water and the underlying waterbed to catch whatever fish are available. It does not include any right to have the water stocked with fish. To the extent that fish may be property at all, they are personal property and not part of the real estate.

§2.532 Right of Natural Flow or Water Level

Rule 9. ***The landowner has a private right to the natural flow of a watercourse and to the natural water level in a pond over that portion of the waterbed owned by him; provided, however, that the watercourse or pond is navigable or tidal; such flow or level may be impaired by the Commonwealth without compensation in order to protect or improve navigation.***

An owner of land bordering a watercourse has a right to have the water flow over the part of the waterbed owned by him in its natural channel, quantity and condition. This is referred to in the law as the right of natural flow.

In the case of a pond without a current the landowner has a right to have the water remain at its natural level and condition over the part of the waterbed which he owns. That is the right of natural water level.

An exception to those rights is made for navigable waters. If the natural waterflow is obstructed or the natural water level is adjusted for the purpose of protecting or improving navigation the landowner is not entitled to compensation.

§2.533 Right of Light, Air and View

Rule 10. ***A landowner has a private right of light, air and view over that portion of a waterbed owned by him; provided, however, that if the watercourse or pond is navigable, the Commonwealth may impair light, air or view without compensation in order to protect or improve navigation.***

The landowner has a right to have natural light and air remain over the water as far as

his ownership of the waterbed extends. He is also entitled to an unobstructed view over the water lying on his portion of the waterbed.

He cannot insist on these rights or on compensation for interference with them in the case of a navigable waterway or pond where an obstruction is created as an aid to navigation, such as a breakwater.

§2.534 Right to Use the Waterbed

Rule 11. ***A landowner has a right to use that portion of a waterbed owned by him for any purpose, provided he does not thereby interfere with the rights of other property owners or violate the law.***

An example of the exercise of this right is the building by an adjacent landowner of a dock or wharf on that part of the waterbed owned by him. Another example is the enclosure of his portion of the waterbed with piles.

§2.535 Right to Use and Remove the Water

Rule 12. ***A landowner has a right to use and remove the water flowing over that portion of the waterbed owned by him for any lawful purpose connected with the use and occupation of his land.***

An adjacent landowner has a right to use the water as it flows over and by his premises for drinking, bathing, irrigation, power or any other reasonable purpose. However any use of the water must be connected with the use and occupation of his land. There is no right to draw off the flowing water for sale to others.

§2.536 Right to Cut and Remove Ice

Rule 13. ***A landowner has a right to cut and remove ice formed in the water over that portion of the waterbed owned by him.***

The landowner has the right to cut and remove ice formed over the part of the waterbed owned by him. This right is broader than that governing use of water in liquid form. There is no limit to the amount of ice which may be taken from over that portion of the waterbed owned by the adjacent landowner. The ice may be used by the owner or sold to others. Removal of the ice converts it to personal property.

§2.54 Easements in Public Ways

Rule 14. ***A landowner has no private rights in an abutting private way not owned by him.***

Many roads and streets are privately owned. However, an abutter does not always have rights in a private way. A number of roads constructed and owned by the government are not public ways. They may have been laid out for access to a military installation, a pumping station or some other governmental project. Though owned by the government such ways are private in that they are not for the purpose of ordinary public travel. An abutting landowner has no private rights in such a governmental "private way."

Many streets and highways are actually owned by private persons, subject to an easement in favor of the public. Such streets are not the subject matter of this section, but are discussed in §3.22.

The streets or ways which are the subject of this and the following two sections are those in which the public has full ownership. A landowner whose property is adjacent to such a street has certain rights in that street. While there may be some technical legal questions whether these rights are "easements," considering them as such leads to clearer understanding.

§2.541 Right of Access

Rule 15. ***The abutting landowner has a right of access to***

(a) That portion of a public way which adjoins his property; and

(b) The system of public ways which it connects.

Right of access to an abutting street is similar to the right of a landowner to access in a watercourse or pond between that part of the waterbed owned by him and the part owned by others. An abutting owner also has a right of access from his property to the system of public streets. This means that he may insist on some means of passing from the street abutting his property to other streets in general.

§2.542 Right to Use the Surface

Rule 16. ***An abutting landowner has a right to use the surface of that portion of a public way which adjoins his property, provided that***

(a) Such use is only temporary, or

(b) Such use is connected with the use of the way only as a route of travel.

Subject to local police and traffic laws and regulations proper temporary uses of public ways include parking of cars, loading trucks and the laying-out of building materials. Some buildings and structures are equipped with doors and gates that swing out onto the street when opened. Such uses may be permissible if not continued for an unreasonable length of time. When the length of use becomes unreasonable and unlawful depends in part on the location of the property and the amount of traffic on the streets.

The abutter has no right to build or maintain a permanent structure on the travelled portion of a public way unless it relates to the use of the way as a route of travel. An example of such a proper related use is a curb cut for a driveway which conforms to the local traffic laws and regulations.

§2.6 Other Easements

Most easements confer affirmative rights of use or occupancy above, on or below the surface of land. A common example is the right of way, that is the right to travel over the land of another. Other types of affirmative easements include:

Easements in the subsurface to install and maintain pipes for gas, oil, water, or other materials.

An easement of drainage, that is a right to have rainwater drain off land onto the land of another.

Easements of air space to install and maintain such things as utility poles and wires.

Easement of light, air and view, that is a right to unobstructed light and view across the property of another.

There are rights which are best described as negative easements. They serve to prevent the owner of property subject to the easement from using it in specified ways. In this category are restrictions created by covenant. A restrictive covenant may limit the height of buildings or the use of neighboring properties for other than residential purposes.

CHAPTER THREE

RIGHTS OF OTHERS IN PROPERTY

§3.1 Limitations upon Use and Value

Rule 17. ***The use to which property may be applied and its value for those uses are limited by:***

(a) Servitudes on that property; and

(b) Applicable public restrictions and regulations.

The preceding chapter deals with factors tending to enhance the value of land. This chapter contains some factors tending to reduce that value.

Often the use of property or some part of it is subject to legal as well as physical limitations. One type of such limitation on use is a servitude. The term servitude means that someone other than the landowner has a right to use the property or has an easement over it. The property is spoken of as being subject to a servitude.

A servitude not only confers rights in the property on the holder of the easement, but also requires the landowner to use his property so as not to interfere with the easement. For example, if someone owns a right of way over property the landowner may not build a fence or structure across the right of way.

Another type of limitation on use of land is a public regulation or restriction. The most common example of this is the zoning ordinance which forbids certain uses of land in certain neighborhoods and often establish minimum standards for lawful uses.

The general effect of servitudes and public restrictions on the property is to limit available uses and thereby lessen market value.

§3.2 Valuation of Land Subject to Servitudes

Rule 18. ***A servitude upon land is considered in reduction of compensation only if such servitude is an easement rather than a mere license or personal right.***

A servitude on property is the converse of an easement appurtenant to that property. A servitude is a limitation on the use of one parcel of land for the benefit of another parcel, while an appurtenant easement expands the use of one parcel at the expense of another parcel.

The effect of a servitude on the amount of compensation due for property taken is the reverse of the effect of an appurtenant easement. A servitude or right of way over the land taken is considered in reduction of value in the same way that a right of way over other land is considered an enhancement of value. In both cases compensation would be measured by the effect of the easement or servitude on the market value of the property taken.

A servitude running against the land must be distinguished from a mere license of use held by some other person. A license is a personal right, not an interest in the property. A personal license to use other property cannot increase the damages for property taken. A license held by another to use the property taken cannot reduce the award for it.

This rule as to licenses applies to all personal rights including such matters as options to purchase the taken property or contracts to remove trees.

Although they are property interests, leases of the land taken are not considered in reduction of its value. The appraiser evaluates the property as a whole, that is as if there were no lease. That applies although the lessee has a right to petition for assessment of damages under Chapter 79

of the General Laws and the award may later be divided between the landowner and lessee. Any such division is not the concern of the taking authority.

§3.21 Servitudes in Waters and Watercourses

Rule 19. ***When a private landowner owns only a portion of the waterbed of any watercourse or pond or when any adjacent watercourse or pond is navigable his rights therein are ordinarily subject to***

(a) Servitudes in favor of other private landowners, and

(b) Servitudes in favor of the general public.

If a private landowner has full control over a watercourse or pond, if its bed is less than 10 acres, and if it is located entirely on his land with no outlet except into publicly owned waters, his ownership of that watercourse or pond is complete and it is subject to no servitudes. Conversely, a landowner has no property rights whatever in a watercourse or pond if he owns no part of its bed, and the concept of servitudes therefore does not apply. It is only in cases falling between these two extremes that the question of servitudes arises. Such rights in others depend upon ownership of the bed and upon whether the watercourse is navigable.

§3.211 Private Servitudes

Rule 20. ***Where the ownership of the waterbed of a watercourse or pond is shared by two or more landowners, the waterbed is subject to private servitudes of***

(a) Access,

(b) Fishing, and

(c) Flow or water level.

Landowners who own portions of a waterbed have the same rights of access between the part they own and the adjacent waters as the landowner whose property is taken, as discussed in §2.53. The landowner therefore may not use his part of a waterbed to obstruct such access.

A landowner who owns part of a waterbed also has the same right of natural flow or water level as the landowner whose property is taken. Therefore a landowner may not divert or pollute a watercourse or pond, or obstruct its flow off or direct it onto the land of another owner.

§3.212 Public Servitude of Navigation

Rule 21. ***Private ownership of a watercourse or pond which is navigable or is affected by the tides is subject to a public servitude of navigation to the extent that the waterbed is not lawfully built upon or enclosed.***

There is a public right of navigation through all navigable watercourses and ponds and through all tidewaters. That right includes navigation and anchorage of water craft over the privately owned parts of the waterbed unless they are lawfully built upon or enclosed.

In order to protect or improve navigation, the government may build structures in the bed of a tidewater stream below low watermark without compensation, even though it may mean obstructing flow or cutting off the access of the private landowner to the channel. The government may also divert a watercourse or it may flood privately owned tidewater flats for the purpose of improving navigation without compensating the owner.

The landowner is restricted as to what he may legally do on the part of the bed owned by him under navigable waters or tidewaters. He may build upon or enclose the flats only if he does not thereby interfere with travel of others through the channel or with the passage of migratory fish. In some localities the government has set harbor lines beyond which no private landowner may build regardless of the extent of his ownership of the bed.

§3.213 Public Servitude of Fishing

Rule 22. ***Private ownership of a watercourse or pond which is navigable or is affected by the tides is subject to public servitudes of fishing and swimming to the extent that the waterbed is not lawfully built upon or enclosed.***

If a watercourse or pond is navigable or is affected by the ebb and flow of the tide, the general public may use the privately owned portion of the waterbed for fishing or swimming unless the waterbed has been lawfully built upon or enclosed. There is no public right to use a beach for swimming if that beach is privately owned.

§3.22 Servitudes in Public Ways

Rule 23. ***The owner of land subject to an easement for a public way retains few private rights therein and all such rights are subordinate to the public servitude.***

The government owns the fee, that is all of the rights, in the land over which some public streets and highways are constructed. This rule and discussion is concerned with privately owned land which is subject to an easement in favor of the government for a public way.

The rights of the private owner are very limited. He may exercise them only to the extent that he does not thereby obstruct the public use of the way or hinder, inconvenience or endanger travelers on it. Subject to that, as the owner of the soil, he may cultivate or remove it. He also owns all trees, flowers, shrubbery and other vegetation growing on the public easement and is entitled to remove them. As owner of all springs and underground waters in or under the public easement, he may remove water and use it. To do so, he may construct a watercourse through the way, so long as he protects the public easement. As owner of the subsurface, he may remove underground deposits or build cellars and vaults in the subsurface. If he owns property abutting the way, he has the rights of access associated therewith.

The public rights in such a way, however, are extensive and any private rights must give way to them. As a practical matter the owner has little more opportunity to use the land burdened with such an easement than he would if the government held the fee in the property. For that reason the taking of an easement for use as a public way usually results in compensation for the full value of the land over which the easement runs. The taking of title to all rights in land, already burdened with such an easement, usually entitles the owner to little or no compensation.

§3.221 Public Servitude of Travel and Communication

Rule 24. ***Private ownership of the land under public way is subject to a public servitude of travel and communication.***

Private ownership of the land under a public way is subject to very broad public rights to use the way for travel and communication. These public rights include the laying of railway tracks and the erection of poles, fences, signs and electric wires overhead. Since these rights extend to the subsurface, the government may build tunnels and subways and install underground pipes and conduits without paying the owner additional compensation. That applies even if it involves the destruction of underground improvements lawfully put there by the owner on the theory that compensation paid for the initial taking included those improvements and installation of improvements subsequent to the initial taking was done with full knowledge of the obligations of the servitude on the land.

§3.222 Public Servitude of Drainage

Rule 25. ***Private ownership of land under a public way is subject to a public servitude of drainage.***

A public easement for a way includes a right of drainage of water from the surface of the way. The government is entitled to build culverts, drains and sewers without additional compen-

sation, even if doing so requires the removal of soil or the destruction of vegetation of underground structures belonging to the private owner.

§3.223 Public Servitude of Repair

Rule 26. ***Private ownership of land under a public way is subject to a public easement of repair.***

A public easement for a way includes a right to maintain and repair the way. Without paying additional compensation to the owner of the land the government may remove earth, gravel or vegetation from one part of the way to repair it at another part or even to repair an entirely different road. It may also remove such material to repair or improve the part from which it is taken and dispose of the material removed in any lawful way without compensating the owner.

§3.23 Other Servitudes

Servitudes are as many and varied as are easements. Land may be burdened with servitudes for the benefit of others including rights of way, easements of light and air, easements of drainage, and all types of restrictive covenants.

§3.3 Public Restrictions and Regulations

Rule 27. ***There can be no compensation for unlawful use or improvement of property or for the enhancement of the value of property were they lawful; provided, however, that if there was a reasonable probability at the time of the taking that the unlawful use or improvement would become legal in the immediate future, there can be compensation for the value of such probability.***

There are many types of public regulations and restrictions limiting the use of land. Some forbid certain uses. Restrictions of this type include zoning ordinances and building lines. Other restrictions only limit the manner in which various uses may be undertaken. Building codes and sanitary regulations fall into this category. Some restrictions on the use of land are state-wide, while others are local.

Public regulations of all types are ordinarily controlling on the valuation of property taken. If at the time of the taking the property is being used illegally, that illegal use may not be considered as one which enhances the value of the property. That rule applies whether the use itself is illegal, such as a commercial use in a residential zone, or the illegality lies only in the type of improvement such as building constructed in violation of the building code. For purposes of appraisal any illegal use and any improvement serving that unlawful use must be discounted to the extent of the illegality. Application of this rule could involve analysis and discount of an actual sale, consumated without knowledge or consideration of an illegal use or improvement.

If, however, an improvement being put to an illegal use could also be put to a legal one for which the property is well adapted, the value thereof for a lawful use must be determined. For example, a building must be leased by the landowner on the basis of use as a bookmaking establishment at a much higher rent than as a store for which it would serve as well. In that case the owner is entitled to compensation measured by value for the latter lawful purpose.

There may be provision in the law for the issuance of licenses to certain landowners allowing them to engage in a generally restricted use, such as a liquor store or filling station. If the land taken was naturally suited for such a restricted use, and if the landowner, although not having the necessary license, could probably have obtained one, the probability that the land could have been so used may be considered by the appraiser. Proper valuation of this element requires consideration of pertinent licenses and of applicable local laws and of the attitude and policies of those public officials with authority and responsibility for administering those laws. The importance of the latter consideration increases in direct proportion with the amount of discretion vesting lawfully in the issuing authority.

While there may be no provision for the issuance of licenses at the time of a taking consideration must be given to the fact that some laws are subject to change. Zoning ordinances, for example, undergo changes from time to time as communities change character. Where there is reason to conclude that a public restriction on certain uses may be removed or modified in the immediate future, the probability of such removal or modification must be considered by the appraiser even though no great value may ultimately be assigned to it.

The above two exceptions to the rule on lawful use, that is probability of licensing and change of law, should be applied with great caution. It is not enough that there may be merely a possibility of obtaining a license or a desirable change in the law. There must be a probability, based on reasonably convincing evidence. Guesswork and speculation are not enough. Moreover, there must be a probability that removal of the illegality will occur within the immediate future. The belief that at some vague, indefinite future time a license probably will be issued or the law probably will be changed is not sufficient. The expected change must appear to be so imminent that a purchaser would take it into account in making an offer for the property.

Finally, even assuming a license or change in law, it is not the full value of the property dedicated to the use thereby made lawful that determines compensation.

It is the probability of removal of the legal impediment applied to the value of the then lawful use which is decisive. For example, assume that the value of the property for a certain unlawful use would be $10,000, and that the chances are nine out of ten that a license may be obtained to engage in that use, the property should then be appraised not at the full $10,000, but at ninety percent of $10,000 or $9,000.

CHAPTER FOUR

GENERAL RULES OF COMPENSATION

§4.1 Just and Reasonable Compensation

Rule 28. ***The owner of property taken by eminent domain is constitutionally entitled to just and reasonable compensation for the taking.***

The Fifth Amendment to the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." Article X of the Declaration of Rights in the Massachusetts Constitution requires that whenever "the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." In Massachusetts the duties and responsibilities of taking agencies and the methods available to private citizens in connection with the protection of that right of compensation are the subject of Chapters 79 and 81 of the General Laws.

Just and reasonable compensation must be fair both to the landowner and to the public. The owner of taken property must be paid its full value at the time of the taking, but no more.

§4.2 Market Value

Rule 29. ***Fair compensation for property taken is based on its market value, that is the price which a willing buyer would pay to a willing seller in an open market, free of coercion, economic or social or governmental.***

Value for purposes of compensation does not mean the special value of the property to the taking agency for building a highway or other improvements. It does not include the elements of value, having particular significance to the owner. It means the value of the uncoerced, emotionally disinterested public market place.

Market value is the price which would be acceptable both to a willing seller and a willing buyer in a free and open market. At the time of the taking by eminent domain the property owner probably is not a willing seller. Often he is unwilling to part with his land. At the same time the taking agency does not have the power of true buyer to bargain in the sense that it can exercise a freedom of choice by shopping around. Though it does have the power to acquire the property whether the owner likes it or not, the taking agency is coerced to the extent that it must have the particular land in question in order to fulfill its duty to complete a public improvement.

Market value, therefore, is not the value of the property to any particular person. It can only be determined by putting aside the needs, desires and personalities of the parties actually involved. The appraiser must pretend instead that the property belongs to some imaginary person, who is willing to sell it to another imaginary person who is willing to buy it, and that it is being sold in the free and open market. The highest price for which it would sell between these imaginary parties in that totally uncoerced market place is its market value.

An additional element must be included in this theoretical situation by the appraiser. Not only must he conceive of a free and open sale, but he must also ignore the fact that there is to be any taking by eminent domain. This negative part of the valuation process is essential to all. The fact that the property is about to be taken may cause tenants to leave or destroy any market for the property or otherwise depress its value. Conversely, property otherwise of little value may command a lively market among those willing to speculate on the economic effect of the impending public improvement. Changes in value arising from knowledge or anticipation of the public improvement for which the taking is made may not be considered in awarding compensation.

§4.3 Value before Recording Order of Taking

Rule 30. ***Compensation for property taken must be based on the value of that property immediately before the order of taking is recorded at the Registry of Deeds.***

Fluctuation of property values dictates that the time when market value is to be determined must be definite. Compensation is based on the value of the property immediately before the order of taking is recorded at the Registry of Deeds. Under the provisions of Chapter 79 of the Massachusetts General Laws title to the taken interest in the property passes to the taking agency at the moment the order of taking is recorded.

§4.4 Value for Highest and Best Use

Rule 31. ***Compensation for property taken is based on the value of that property for its highest and best available use.***

The property taken might be excellent for building purposes, but unsuited to farming. It might be of great value for a factory, but worthless for a home. Only those uses to which property is naturally adapted and to which lawfully it may be dedicated may be considered in determining its market value. Of those uses the appraiser must select the highest and best, that is the one to which the property can be most advantageously and profitably devoted.

Making a reasoned judgment about the highest and best use of a given piece of property is one of the most significant basic functions of the appraiser. The purpose for which the property is taken is rarely any indication of its highest and best use. Often its highest and best use is that to which it was being dedicated by its owner at the time of the taking. The appraiser must consider any plans the owner might have had for future uses. The highest and best use may be one to which the property has never been applied. It may never have been considered even by its owner at the time of the taking. A sound decision on this important fundamental requires the appraiser not only to know the local zoning by-laws controlling the property at the time of the taking, but also the probability that they might reasonably be expected to be amended to effect highest and best use and value. Thorough preparation on this point by appraisers retained by the taking agency may provide decisive rebuttal at the administrative or judicial level to superficially plausible suppositions by or on behalf of the former owner of the taken property.

§4.41 Factors Determining Highest and Best Use

Rule 32. ***The highest and best use of property taken and its value for that use depends upon***

(a) The property itself,

(b) Any legal restrictions on the use of that property

(c) The location and surroundings of that property.

Two of the major decisions included in an appraisal are deciding the highest and best use of the property and the value of the property for that use at the time of the taking. In making those decisions the appraiser must assemble and analyze all the pertinent facts. These facts fall into three categories:

(a) All physical aspects of the property discussed in Chapter Two;

(b) Any legal restrictions on the property taken, public or private, which might limit its value for some uses and make it altogether unavailable for others, discussed in Chapter Three; and

(c) The location and character of the surroundings of the property taken, which might also affect its availability for certain uses, discussed in Chapter Six.

The conclusive decision in the appraisal process is the valuation of damages arising from the taking by eminent domain. The generally accepted methods of arriving at that opinion are discussed in Chapter Five.

CHAPTER FIVE

METHODS OF VALUATION OF PROPERTY TAKEN

§5.1 The Three Methods of Valuation

Rule 33. *The three methods of valuation of property taken generally accepted in the courts of Massachusetts are based on*

(a) Sales of the property and of comparable properties, or

(b) Capitalization of net income from the property, or

(c) Reproduction cost of improvements less both depreciation thereof and functional obsolescence.

After all factors relating to the property taken have been assembled and considered, judgments on the value of that property must be stated in dollars and cents. There are three methods of reaching such conclusions which are generally accepted by the Massachusetts courts which are discussed in the following sections. The appraiser must consider the application of all three methods in every case and state in his report the reasons both for not using a method or methods and for selecting the method or methods upon which he ultimately bases his judgment as to value.

§5.2 Sales of the Property Taken or of Comparable Property

Since the basis of compensation for property is its market value at the time of the taking, the most reliable method of determining the amount of compensation is to examine sales of the taken property or of similar property sold in a similar market.

§5.21 Sales of the Taken Property

Rule 34. *Valuation of the property taken may be based on sales of that property only if*

(a) An actual sale was involved,

(b) It was a voluntary transaction,

(c) It was recent, and

(d) The condition of the premises remained substantially unchanged until the time of the taking.

If the taken property was involved in a sale within a few years before the taking, the price at which it was sold may provide a highly accurate indication of its market value at the time of taking. Whatever the cause may be, if reliance is not placed on such a sale in the valuation of the property, the appraisal report must contain a statement of the facts surrounding the sale and a careful exposition of the reasons for its exclusion from further consideration.

A sale of the taken property provides an acceptable basis for valuation only if it meets the four requirements stated in Rule 34 and discussed in the next four sub-sections.

§5.211 An Actual Sale

There must have been an actual sale. An offer to purchase or to sell may not be considered. A formal contract to purchase the property is generally not acceptable.

Caveat: A formal, binding contract to purchase the property taken shall be considered if its performance is frustrated by the actual taking.

It is not essential that the full purchase price be paid to the seller at the time of the sale.

However, title must pass to the buyer to complete a sale. Real estate is often sold partly for cash and partly for a purchase-money mortgage which is to be paid over a period of years. Such an arrangement is a sale for purposes of valuation. The total of the downpayment and the principal amount of the mortgage may be used as a guide to market value.

§5.212 A Voluntary Transaction

The sale must have been voluntarily made. This means that the seller was willing, not forced, to sell, and that the purchaser was willing, not forced, to buy. Careful consideration must be given to the personal or other business relations between seller and purchaser.

The appraiser should be suspicious of any sale involving an owner who was in financial straits at the time of the sale. Such an owner may have been under pressure to liquidate the property for reasons unrelated to its market value. The same consideration applies to bankruptcy sales and mortgage foreclosure sales. The appraiser should also be alert to any indication that the purchaser was under some special pressure to buy. For example, a purchaser may be given the choice of buying the property at an inflated price or allowing it to be sold to some business competitor, organization or individual he considers an undesirable neighbor.

A close and friendly family or business relationship between seller and purchaser may distort the price, as may personal enmity or rivalry.

Unless the appraiser is satisfied that there were no such personal factors involved, he should not use that sale as a basis for valuation. If he does not use it he must include in his report the reasons supporting his decision.

§5.213 A Recent Sale

Only a recent sale may be considered. There is no definite rule defining "recent" in terms of exact elapsed time. However, except in extremely unusual circumstances five years is as far back as an appraiser need go. The activity of the market for properties such as that taken influences the meaning of "recent." Unless the real estate market in the area has been more or less constant over the period involved or unless sales in the area or of the type of property involved vary infrequently it is preferable not to consider sales more than three years old. Market fluctuations and other factors often affect adversely the reliability of the selling price in older sales as a guide to market value at the time of taking. Generally, the more recent the sale, the more reliable will be the selling price as a standard of value.

§5.214 Substantially Unchanged Condition

Before relying on any sale of the property prior to the taking, the appraiser should be satisfied that there has been no substantial change in the condition of the premises between the time of the sale and the time of the taking. The condition of the premises for this purpose includes all those factors to be considered in the appraisal of the taken property as described in the preceding chapters. If there have been major changes in the condition of the premises, the selling price will probably not be an accurate guide to value at the time of the taking no matter how many adjustments may be made. In such circumstances the appraisal report must contain a thorough explanation. If there have been some changes, but none of a substantial nature, an appraiser may use the selling price after adjustment to reflect subtractions or additions arising from the changes including a complete explanation therefor. In determining what such allowances should be the appraiser must rely on considerations other than sales data.

§5.22 Sales of Comparable Properties

Rule 35. *Valuation of taken property may be based on a sale of properties comparable to the taken property only if*

(a) An actual sale was involved,

(b) It was a voluntary transaction,

(c) The property sold was comparable to the taken property.

(d) The comparable property was located near the taken property, and

(e) The sale was made within a reasonable time before or after the taking.

The selling price of properties comparable to the taken property are most useful guides to value when the taking involves relatively standard types of residential, industrial or commercial property without unique or special characteristics. Comparable sales may possibly be of assistance in the valuation of specialized properties such as churches, camps, schools, clubs and private roads, subject to most careful consideration and exposition in the appraisal report of those factors having particular influence on the market for such unique properties in general and on the specific comparable sale or sales.

If any available comparable sale is excluded from consideration by an appraiser because of failure to meet the requirements set forth herein, the reasons for exclusion must be stated in the appraisal report.

The five requirements of the comparable sales method are discussed in the sections immediately following.

§5.221 An Actual Sale

To be admissible as comparable there must be an actual sale of a property. This is the same rule that governs the use of sales of the taken property (cf. §6.211). Without a sale, no opinion on the value of a property offered as comparable property may be considered or will be admissible as evidence unless performance of a formal, guiding contract to purchase the property is frustrated by the actual taking itself.

§5.222 A Voluntary Sale

To be accepted as comparable the sale of a property must have been voluntarily made. Comparable property is often taken along with the property being appraised. The amount of compensation paid for such comparable property by the taking agency by way of compromise or judicial verdict may not be considered in the valuation of other property because there is nothing voluntary about such a transaction. If the property being considered as a comparable was actually purchased by an agency or corporation having the power to take it, the selling price may be used, provided the appraiser is certain that it was truly a voluntary sale. The circumstances of such a situation should be determined and examined with more than ordinary care.

§5.223 Similarity to the Taken Property

To be acceptable as comparable a property involved in a sale must be similar to the taken property. No two parcels of real estate are exactly alike. There are inevitable differences in size, use, improvements and so forth. The appraiser must analyze the taken property and the property with which it is being compared using all of the factors previously discussed herein as a check list for the standard of comparison. The valuation conclusions must have provided for allowances for all differences including exposition in the appraisal report of the reasons therefor.

If there are many important differences neither the property nor its sale can be considered comparable. It is impossible to state any absolute rule on the degree of similarity the properties must have. However, more and greater differences become acceptable as it becomes increasingly difficult to locate more closely comparable properties until ultimately circumstances develop that eliminate this method of appraisal by sales of comparable properties.

§5.224 Location

To be accepted as comparable a property must be located close to the taken property in order to be subject to the same market conditions. There is no absolute rule defining maximum distance. However, the greater the similarity between the two properties, the greater the distance that is admissible.

§5.225 Time of Comparable Sale

To be admissible as comparable sales, the transactions must have occurred within a few years before the taking—usually five at most. Sales of comparable property made after a taking may be admissible provided they occur within approximately a year of the taking. The lapse of time that is acceptable depends in part on the degree of similarity of the properties being compared. In special circumstances sales of comparable property completed more than a year after a taking may be admissible as evidence in a trial.

§5.3 Capitalization of Net Income

Rule 36. ***Valuation may be based on the capitalization of net income from the property taken provided that***

(a) The property is adapted to its present use,

(b) There is a market for rentals of property of its type, and

(c) Its rental income would, but for the taking, continue for a reasonably long period of time thereafter.

As a method of determining market value, capitalization of net income from the taken property involves the four basic considerations outlined in simplified form below:

1. Determination of average yearly gross rental income for at least three years. For purposes of illustration, assume it to be $5,000.00.
2. Determination of the average yearly expenses. They include property taxes, insurance premiums, utility expenses, labor costs and all other expenses involved in maintaining the premises. Operating expenses for this purpose do not include costs of running a business on the premises. Continuing the illustration, assume the average yearly expenses total $4,000.00.
3. Computation of average yearly net rental income by deducting expenses from gross rental income. In the illustration:

Gross Rental Income	$5,000.00
Less Operating Expenses	4,000.00
Net Rental Income	$1,000.00

4. Capitalization of net rental income involves multiplying the average yearly net income figure by a rate of capitalization. The capitalization rate is a constant factor based on the normal rate of return expected from property of the type and location being appraised. Tables of such capitalization rates are available to the appraiser from professional sources. If the appropriate capitalization rate in the above illustration is 10, that is if the return expected from the capital investment in property of the type being appraised is ten percent, the capitalization of net income method of valuation would require this final computation:

Net Rental Income	$1,000.00
Multiplied by Capitalization Rate	10
Market Value	$10,000.00

Valuation by capitalization of net income may be less reliable than by sales of the taken or comparable properties. The ability of property to produce income is at best an indirect measure of its market value. Despite its limitations the capitalization of income method is valuable when no useful sales are available. Even when information about sales of comparable properties is available, the appraiser should confirm his value judgments by this method. If this method is not used as at least a supplementary computation, the appraisal report must indicate the reason for its omission.

The four limitations on the use of the capitalization of net income method of valuation are discussed in the next four sections.

§5.31 Property Must Be Adapted to Present Use

The capitalization of net income method may be used only when the property being appraised is dedicated to a use to which it is well adapted at the time of the taking. If the property is not being so used, the method will produce hopelessly inaccurate results.

§5.32 Rental Income

Only net rental income may be capitalized. Neither business income, the market value of an inventory, nor produce on the land may be considered. If the property was in fact being rented, or had been rented at some time shortly before the taking, actual rental may be used provided that the rents were:

(a) Paid in the ordinary course of business under normal conditions and in good faith;

(b) Not more than the rents generally paid in the neighborhood for the type of property involved; and

(c) Accruing at the time of the taking or within a reasonably short time before it.

If the property was not being rented at the time of the taking and had not been rented for some time before the taking, the opinion of the appraiser on its potential gross rental income, operating expenses and net rental income may be used. The opinion must be based on credible evidence from dependable sources, and not on mere guesswork. When the appraiser estimates potential rent, reasonable allowances for periodic vacancies must be deducted from gross income to determine net income. Such a vacancy allowance is based on the history of the taken and similar properties. If the actual gross income is not available for a number of years sufficient in the opinion of the appraiser to provide for normal vacancies, then he should deduct an appropriate vacancy allowance from actual gross income to determine net income for capitalization.

§5.33 A Rental Market

The capitalization of net income method cannot be used unless there is a market for rentals of property of the type involved. There is a rental market for most types of property. Properties without rental markets include such special-purpose properties as churches, camps, schools, clubs and private roads.

§5.34 Income for a Reasonably Long Period

The income method may be used only if the rental of the property at the rate figures could, except for the taking, be expected to continue for a reasonably long period after the time of taking. The meaning of a reasonably long period depends on the type of property involved, the type of tenant typically occupying such property and all the other circumstances. A reasonably long period may never be less than one year.

§5.4 Reproduction Cost of Improvements less Depreciation and Functional Obsolescence

Rule 37. ***Valuation of taken property may be based on the reproduction cost of improvements on that property less both depreciation of improvements and functional obsolescence plus the value of the land, itself; provided, however, that those improvements enhance the value of the land for the use to which it is best suited.***

An improvement has two types of capital cost. One is the original cost of an improvement. Second is the cost to replace or reproduce a given improvement at the time of the appraisal.

While original cost may be a guide to the value of improvements in some situations, its use is generally discouraged by the courts unless a structure has been built shortly before a taking. This section is therefore devoted entirely to the use of production cost as a basis of valuation.

Reproduction cost of improvements may be used in the valuation process in two ways. It may be a necessary supplement to incomplete data compiled for the sales method of valuation. For example, a garage may have been erected on the taken land between the time of its last sale and the time of the taking. Such circumstance may require the appraiser to use the reproduction cost method to value the garage, to compute an appropriate increment in the value of the entire parcel. Use of the same method would be essential to make proper adjustment if the comparable sales method was applicable except for the fact that the property that was otherwise comparable lacked a garage which the taken property had as an improvement.

In some situations valuation by the reproduction cost of improvements on taken property may be the preferable method for determining the the value of an entire property. It is generally considered less accurate than the sales method of appraisal. However, it is useful when sales data are not available. In the case of some special-purpose buildings when both sales and rental income data are unavailable or unreliable it may be the only acceptable method of valuation.

One important limitation on the use of reproduction cost for valuation is the requirement that the reproduction cost of an improvement be considered only to the extent that the improvement increases the market value of the land for the uses to which it is best suited.

The amount of the cost of reproduction cost must be based upon the written analysis and computations of competent construction engineers, who will or have qualified as expert witnesses in a Massachusetts Superior Court. When those opinions become available, to make his decisions on the value of the entire property the appraiser must make deduction for depreciation and functional obsolescence and additions of the value of the land itself. In some cases the construction engineer could make deductions for observed physical depreciation.

§5.41 Deduction of Allowance for Depreciation

Whether the appraiser uses the reproduction cost method for individual improvements or for all improvements considered as a whole, allowance must be made for their depreciation.

The rate of depreciation applied to total reproduction cost, determined by qualified engineers, depends on when the building was constructed, the materials with which it was built and the adequacy of repairs and maintenance during the life of the building. While the depreciation rate for each improvement must be given individual consideration there are guides available to appraisers from professional sources which are appropriate bases for determining the proper rate. The rationale for the selection of a particular rate of depreciation must be included in the appraisal report.

When it has been determined, the rate of depreciation is multiplied by the total cost of reproduction. The result is in an amount representing depreciation in dollars, which is then deducted from the total reproduction cost to determine net depreciated reproduction cost.

§5.42 Deduction of Allowance for Functional Obsolescence

Functional obsolescence occurs when improvements have become outmoded as to layout, style or design in comparison with properties more recently constructed for the same or similar uses. A decline in value of an improvement due to functional obsolescence is deducted from reproduction cost in the same manner as the allowance for depreciation. Professional sources also provide guides to appraisers on proper rates to be used in computing this deduction. However, they are much less exact than those for rates of depreciation. Because determination of the proper rate of functional obsolescence includes a significantly greater factor of professional opinion than is the case with depreciation, the appraiser must include in his report an exposition in detail of the reasons for his decision and as much factual documentation in support thereof as possible.

By multiplying the total reproduction cost by the rate of or factor for functional obsolescence the appraiser converts it into a dollar amount. Deduction of that amount from net depreciated reproduction cost results in the net present value of an improvement as determined by the reproduction cost of appraisal.

§5.43 Addition of Allowance for Value of Land

The reproduction cost method only results in a value for improvements on the land. It includes nothing for the value of the land itself. It is therefore necessary to add the value of the land, as if it were vacant, to the value of the improvements. To determine the value of the land the appraiser must rely on the sales method of appraisal except in those infrequent instances when a land lease produces a net rental income from the taken or similar property.

The final mathematical computation for the reproduction cost method of appraisal is the addition of the land value to the net present value of improvements resulting in total appraised value.

CHAPTER SIX

LOCATION AND SURROUNDINGS

§6.1 Location, Neighborhood and Value

Rule 38. ***The uses for which property is available and its value for those uses are influenced by***

(a) The relative position of that property,

(b) Neighboring properties, and

(c) The community and region in which the land is located.

The subject of the order of taking is of course the property itself. However, the location and surroundings of a piece of real estate have a considerable bearing on the uses to which it can be best applied and its value for those uses.

Assume that there are two pieces of property which are identical in every physical respect. If one of them is located in an attractive neighborhood where people like to live and the other is in an undesirable, run-down district, there will be a substantial difference in their market values.

The responsibility of the appraiser to determine fair market value requires consideration of environmental factors. Such factors may be divided into the three categories which are the subject of the next three rules.

§6.2 Relation to Activity Centres

Rule 39. ***The proximity to the property taken and availability of facilities such as business or residential district, shopping centers, transportation, public utilities, churches, schools and natural advantages including recreation areas have direct influence on its value.***

As factors in valuation the proximity and availability of various facilities vary in importance with different types of property. As modern transportation becomes more efficient physical proximity becomes less important in the valuation of the accessibility to a property of those goods or services which contribute to its maximum use. Those which are most often important aspects of valuation include:

Business or Residential Districts. If residential property is very close to a business district, its value may thereby be lowered. However, a resident must have access to stores, banks and other services as well as to his place of employment. If they are located very far from his property, the resulting isolation and inconvenience may tend to reduce its value as a residence.

Similar general considerations must be applied to commercial and industrial properties. If they are too close to residential districts, they may be in danger of causing a nuisance and of being restricted in some way from full use. However, such activities depend on residential districts for their labor supply and often for their customers. If they are too remote, business may suffer and value be depressed.

It may be advantageous or necessary to the efficient and profitable operation of industrial property that certain types of commercial properties be close to it to assure adequate markets, sources of supply and employee services. Commercial property may also sometimes be more valuable because of industrial establishments in the vicinity.

Shopping Centers. A versatile shopping center, convenient to residential property, is a desirable type of nearby business district. To a homeowner in the immediate vicinity of a shopping center, however, the convenience is likely to be outweighed by noise and lack of privacy. Either situation must be reflected in the value of residential property.

Transportation Facilities. The availability of adequate public transportation is important to almost all types of property. Residential property is enhanced in value if it is unobtrusively close to all means of transportation. As with other useful facilities or services the possibility of being too close must be considered. Being contiguous to a modern highway or railroad tends to diminish residential value. Commercial and industrial property are less affected by aesthetic factors and are more concerned with the relative ease with which adequate supplies of raw materials, labor and customers can be achieved. Also, importance of convenient public transportation depends to some extent on the proximity of property to other residential and business sections of a community.

Public Utilities. The availability of public water supply, public sewers, fuel, electricity and telephone connections is important to all types of property. In the case of industrial and some commercial property their availability assumes added importance because of the extensive use of public utilities and the relation of their cost to profitable operations.

Churches, Schools and Associated Facilities. The availability of churches, schools, parks, libraries and other points of civic and social interest has an important influence on the value of residential properties. It is ordinarily much less of a factor with industrial and commercial properties.

Natural Advantages and Recreation Areas. Natural advantages such as rivers, ponds, beaches, forests and picturesque scenery often increases the value of residential property in the area. These natural features may also attract visitors from other areas and thereby enhance the value of commercial establishments.

§6.3 Character of the Neighborhood

Rule 40. ***The neighborhood of the taken property should be evaluated by considering its character and condition, shape and size of lots, present uses and use trends, inhabitants, neighboring streets and approaches to the neighborhood.***

The character and condition of neighboring properties is especially important if residential land is taken. If the neighborhood is generally attractive and well maintained, adequate both as to conformity of use and variety of architectural style, with a reasonable amount of trees and other vegetation, the property taken will be relatively more valuable. In an unattractive, run-down neighborhood, the value of the same residence would be less. This rule applies to commercial property. The more pleasing the neighborhood, the more likely it is to attract tenants and customers.

If neighboring lots are large and well shaped, the value of residential property is likely to be higher than in a congested neighborhood. The distance between the property taken and the buildings on either side may be important for the same reason.

The use of neighboring properties is important. Proximity of a residential property to a commercial or industrial neighborhood tends to depreciate its value.

Trends toward future land use in the neighborhood should also be considered including any indication of new construction and growth. If the neighborhood is changing in use, land previously dedicated to one purpose may become better suited to another purpose and therefore more valuable.

The adequacy of zoning laws and of building and sanitary regulations in the neighborhood is also important. Planning board studies which may foreshadow future zoning changes should be considered as well.

The type of people living in and frequenting the neighborhood may affect value, particularly of residential property. Average family size, age groups, income and social levels also affect value as does the number of unoccupied dwelling units.

The character and condition of the streets near the property taken affect its value. This includes their appearance and upkeep as well as their width and the amount of traffic on them. Heavy traffic tends to depress the value of residential property and to increase the value of commercial properties. "Dead-end" streets, on the other hand, tend to enhance residential values.

§6.4 Community and Region

Rule 41. ***The community and region in which the property taken is located must be evaluated by considering levels of employment and income, industrial production, price and retail sales, building activity, interest rates, tax rates, building costs, and population characteristics and trends.***

CHAPTER SEVEN

GENERAL EFFECTS OF PUBLIC IMPROVEMENT WITH PARTIAL TAKING OR NO TAKING

§7.1 Classification of Sources and Effects

Two sources of injury or benefit to property are discussed in the following sections:

(a) A partial taking, leaving the owner after a taking with a portion of the total property owned before taking; and

(b) A public improvement, whether or not there has been a formal taking by eminent domain.

Injuries from a public improvement to property not involved in a formal taking are often identical in effect and in legal consequences to injuries involving a partial taking. The two classes of injuries are generally considered together in this manual and are treated separately only when the distinction has some practical or legal importance.

§7.2 Compensation for Partial Takings

Rule 42. ***An owner of property of which a part is taken by eminent domain is constitutionally entitled to just and reasonable compensation for injury to his remaining property caused by the taking or by the public improvement for which the taking is made.***

In many cases a taking of land does not include all of the land of the owner of the parcel taken. A highway may be laid out through an area without regard to existing property lines, leaving citizens with part or all of the property owned prior to any taking, but in a considerably changed situation. Compensating a land owner for the property actually taken from him is only part of the responsibility of the taking authority. Reimbursement must also be made for the injury to his remaining property inflicted by the partial taking and by the construction and operation of the improvement. Compensation for injury of this type is often referred to as severance damage or damage to the remainder.

The extent of the constitutional right to just and reasonable compensation for severance damage or injury to property remaining after a taking and its limitations are considered in this and the following two chapters. The valuation process for interest entitled to be considered is set forth in Chapter Ten.

§7.3 Compensation for Injury to Property of Which No Part is Taken

Rule 43. ***An owner of property of which no part is taken by eminent domain may be entitled to just and reasonable compensation for injury to his property caused by a public improvement.***

A public improvement such as a highway may be contiguous to property and cause serious injury without taking any portion of that property. In such a case the owner may be entitled to compensation. This type of compensation is often referred to as consequential damages, that is, damages to property caused by some public improvement of which no part has been taken. The ap-

pelation, "consequential damages," is inexact for it has other connotations. It may be used as a generality to include all damage arising as a consequence of a partial taking or a public improvement. It may be given a narrow meaning to describe those injuries which are so remote and speculative as to be noncompensable.

Unlike the right to severance damages the right to compensation when there has been no taking is not based upon the Constitution except under unique circumstances. This right usually must be created specifically by statutes relating to injuries arising from certain types of improvements. The right may be established by the law authorizing of financing the public improvement. However, injuries sustained without a formal taking may create a nuisance or a servitude so severe as to support a claim for compensation under Article X of the Massachusetts Declaration of Rights. In any case Chapter 79 of the Massachusetts General Laws creates no substantive rights to damages. It only establishes procedures governing the payment of compensation, the right to which must be found in the applicable enabling act.

The possibility that damages to property can arise from a public improvement without a taking of any part of that property demonstrates that comprehensive performance of his duty to the taking agency by an appraiser requires him to become thoroughly familiar with the legislation authorizing and financing a public improvement as well as the General Laws in the appendix of this manual. If an appraiser encounters facts that raise doubts about the law applicable thereto he should ask the taking agency in writing to request a formal written opinion from its legal counsel. In cases arising from public improvements by departments of agencies of the Commonwealth a request would be made by the taking agency for an opinion of the Attorney General.

§7.4 Reduction of Compensation by Benefit Conferred

Rule 44. ***Compensation to which an owner of property is entitled by reason of a partial taking or a public improvement is reduced by the special benefit conferred on his property by the taking or improvement.***

The effects of a partial taking or of a public improvement on property not taken may be beneficial rather than injurious. More often property may be injured in some respects and benefited in others.

The value of any benefits is appraised separately and then deducted from the damages suffered by the landowner. Just and reasonable compensation means only the reduction in the fair market value of the property involved, that is total damages sustained minus the value of benefits conferred.

§7.5 Direct Cause and Reasonably Probable Consequence

Rule 45. ***Injuries and benefits to property not taken may be considered in determining compensation only to the extent that they are directly caused by and are a reasonably probable consequence of a taking of land or the construction of a public improvement.***

To be entitled to consideration in an appraisal, any injuries to property not taken must arise either from a partial taking or from a public improvement. Every injury and benefit considered must be traced back to its cause in writing in the appraisal report. Fundamental to reliable operation of the appraisal process is discovery of the sources of injury or benefit and analysis of them in terms of their probable consequences.

§7.6 Direct Injuries and Benefits

Rule 46. ***Only that injury or benefit which is a direct consequence of a partial taking or of a public improvement may be considered in determining compensation.***

If an injury or benefit arises exclusively from activities of a taking agency, the requirement of this rule is fulfilled. If, however, injury or benefit arises from natural causes or some other

unrelated source, it may not be used as an element in determining damages to property. When in doubt an appraiser should include in his written report a complete exposition of his reasoning in support of whatever decision he makes on a problem of this type. The following examples are intended to provide guidance in consideration of cases in this area.

1. If a dam is constructed by the Commonwealth on a watercourse flowing through private property, the level of the water upstream from the dam will usually rise. Raising the water level may injure nearby land through flooding. It may also provide a benefit by making available needed irrigation to other land. The casual relationship is direct.

Source	
(Dam)	Compensable Injury (Flooding)
	Deductible Benefit (Irrigation)

2. Circumstances created by the dam in the preceding example might result in the location of new industry in the vicinity. It might cause further injuries to property from air and water pollution and further benefits from increased economic activity, new and better streets, larger tax receipts. In such circumstances the required element of direct cause is lost. The existence of the dam may be an important causal factor, but the subsequent injuries and benefits also derived from the availability of financing, the location of markets and other factors independent of the dam.

Source 1	Source 2	Source 3	Source 4
(Dam)	(Financing)	(Markets)	(Other Factors)

New Industry

Non-Compensable Injury	Non-Deductible Benefits
(Air or Water Pollution)	(Increased Economic Activity, etc.)

It should be noted that this manual is concerned only with the law pertinent to appraisal of damages arising from exercise of the power of eminent domain. Statements therein relate only to liability of public agencies lawfully acting by authority derived from that power. No inference should be drawn herefrom concerning possible liability of one private citizen to another.

3. If the "Other Factors" are natural rather than made by man and they combine with a change in the pattern of water flow, caused by the dam, to give rise to some injury or benefit to private land, the requirements of the direct and proximate rules are fulfilled. Damages and benefits must be considered by the appraiser.

	Source 1	
Source 2	(Dam)	Source 3
(Change in Water Flow)	Plus or Minus	(Natural Rainfall)
	Compensable Injury	
	or	
	Deductible Benefit	

However, injury or benefit resulting entirely from natural causes, unaffected by the dam, could not be considered.

4. The causal chain between a taking or a public improvement and the ultimate injury or benefit may include one or more intermediate "links." The causal relationship is maintained regardless of the number of such "links," provided each individually fulfills the requirement of directness.

5. The changed pattern of water flow caused by the dam of the earlier examples may result in a deflection of the current into the bank of the land not taken and erosion of the soil. Injury or benefit might arise from the erosion which would not have resulted solely from the change in flow. The erosion might cause injury to a building. It might also improve drainage. One source of

injury and benefits resulting from the latter are directly caused by the taking or improvement and must be considered by the appraiser.

Source 1 (Dam)	Source 2 (Deflection of Current)	Source 3 (Erosion)
	Compensable Injury (Injury to Building) or Deductible Benefit (Improved Damage)	

6. An injury or benefit may occur which itself is the source of some other type of injury or benefit. For example, a dam may impair the natural flow of water by private land. Apart from being a compensable injury, that impairment may adversely affect the fertility of the same land. The rule of directness would be satisfied as to both injuries.

Source (Dam)	Compensable Injury (Impairment of Natural Flow)	Compensable Injury (Impairment of Fertility)

§7.7 Reasonably Probable Injuries and Benefits

Rule 47. ***Only those injuries and benefits which are reasonably probable consequences of a partial taking or a public improvement may be considered in determining compensation.***

Assuming fulfillment of the requirement of direct cause the appraiser may consider only those injuries and benefits which are reasonably probable consequences of a partial taking or of a public improvement. For example, the protection given by a dam against floods of a type commonly experienced in the vicinity may be a benefit entitled to consideration, whereas protection by such a dam only against extraordinary floods is too speculative a benefit for appraisal purposes.

The appraiser is not concerned with what might possibly happen, but only with what in all probability will happen. A good, practical rule is embodied in the question: Would a potential injury or benefit influence a private purchaser of the land?

§7.8 Types of Partial Taking

Rule 48. ***The taking of property may be a source of compensable injury or deductible benefit to property not taken when***
(a) The area taken is less than the entire tract, or
(b) The interest taken is less than all of the rights of ownership.

One important source of injury or benefit to land is the physical severance caused by the taking itself, as distinct from the consequences to the remainder arising from what is subsequently done by the taking agency.

§7.81 Taking of an Area Less Than an Entire Tract

Rule 49. ***The taking of part of a larger tract of land may be a source of compensable injury or deductible benefit arising from severance when the entire tract meets the tests of***
(a) Unity of title,
(b) Physical unity, and
(c) Unity of use.

The appraiser of damages must determine initially whether the taken land was a part of a larger tract or was a separate and independent parcel. In the latter case the taking would not qualify as partial and the owner would not be entitled to severance damage.

(a) **Unity of Title.** All of the property must be owned by the same organization, person or group of people if it is to be treated as a single tract. This requirement does not mean that

unity of title is destroyed by mortgages, leases or servitudes in third persons. Property owned by heirs, represented by an estate in probate, would have unity of title. However, if distribution of the assets of the decedent resulted in the division of the property among the heirs into separate parcels, unity of title would be lost. Tenants in common and joint tenants holding undivided fractional interests, have unity of title. Trusts, corporations and associations preserve unity of title regardless of the number for whose benefit they own the property. Though the record title to a number of parcels of property may be in different names, if the true beneficial ownership of all rests in a single individual or organization the real estate may be treated as a single tract.

(b) **Physical Unity.** If the land is unoccupied and not in use it is a single tract only to the extent that its parts are physically united or contiguous. If its parts are physically united and all devoted to a single use, such as a farm, industrial corporation, shopping center or dwelling, the property is a single tract. If two of its parts are separated by fences or by some other obstruction, it may still be a single tract, but only if there is some means of access between the parts and if the two parts are devoted to the same use. A town or county line passing through property has no effect on whether or not it is a single tract. A public way passing through property does not **per se** negate considering parcels so separated as a single tract.

(c) **Unity of Use.** If the land is actually occupied or in use it is a single tract only to the extent that it is devoted to a single use. A tract which has been divided into house lots for sale to different purchasers is a single parcel. The existence of an approved subdivision plan shall be considered in valuation of the tract. The measure of damages would continue to be the difference between the value before and after the taking.

§7.811 Partial Taking by Destruction of an Appurtenant Easement

Rule 50. ***An appurtenant easement and the property to which it is appurtenant are always parts of the same tract and the destruction of such an easement may be a partial taking.***

A partial taking may consist of the destruction of an appurtenant easement. Such an easement is always a part of the same tract as the land to which it is appurtenant (cf. §3.5 **et seq.**).

§7.8111 Public and Private Easements

When there is a public as well as a private easement they must be distinguished in determining whether the acts of the taking agency actually deprive the landowner of any compensable right. That question arises usually with respect to watercourses, ponds and public ways. (cf. §3.5 **et seq.**).

Public rights ordinarily exist in a watercourse or pond which is navigable or affected by the tides. The deprivation of the private right of access or of natural flow is a taking only if caused by a public improvement unrelated to navigation. (cf. §3.53 **et seq.**).

A landowner whose property abuts a public way has a right of access to that way, subject to public rights of travel, drainage and repair. The right of access may be cut off by the public exercise of any of these rights without any property being taken from the owner. If, however, the abutter owns the title to the public way a deprivation of access for any purpose outside the scope of existing public easements constitutes a taking. (cf. §3.54 **et seq.**) The right of an owner to compensation for loss of access without any taking of his property depends on assumption of liability therefor by the sovereign Commonwealth either by General Law or in the statutes authorizing and financing the public improvement. This is another potential source of liability which dictates that an appraiser must be familiar with the laws included in the appendix hereto and appropriate special enabling and financing acts. (cf. §8.622.)

A partial taking of land occurs not only when the taking is physically confined to part of the land, but also when it is limited to a part of all of the rights deriving from ownership of that land. The creation of a public easement in or over private land is a typical example of such a partial taking.

The interest taken must differ in kind, location or extent from any prior interest exist-

ing in the land if it is to qualify as a taking. If the taking agency merely appropriates a pre-existing easement for public use, no taking from the landowner is involved, but rather a total taking from the owner of the easement.

When considering practical takings of this type the appraiser must determine with utmost care exactly what is taken and what remains to the landowner. The order of taking must be examined to determine the size, location and purpose of the easement. There are numerous types of public easements, creating different rights in the parties.

One of the most common easements is the street or highway easement. The public rights under such an easement are so broad that the landowner usually receives compensation for the full market value of the land as though there had been a taking of all of his rights in the property rather than an easement.

Other types of easements taken in connection with highway construction include:

Slope Easements, that is the right to have the land on either side of the highway slope toward the highway location for its protection.

Drainage Easements, that is the right to carry surface water from the highway.

Removal Easements, that is the right to remove structures from private land.

Subsurface Easements, that is the right to lay pipes or drains.

Easements of Air Space, that is the right to construct bridges, etc.

Every such easement in some way tends to reduce the usefulness of the land to its private owner and is a potential source of injury.

Partial takings of this type do not always consist of the taking of an easement with title to the land remaining in the private owner. The process may be reversed. Title may be taken subject to an easement or other partial interest remaining in the prior owner. For example, if the taking of absolute title would deprive the private owner of access to other land belonging to him, the order of taking may reserve to him a private right of way over the land taken.

§7.9 Public Rights Involved in Public Improvements

Rule 51. ***With or without a taking by eminent domain of a part thereof the establishment, construction, repair or discontinuance of a public improvement may be a source of compensable injury or deductible benefit to private property to the extent that there is involved a governmental right to***

(a) Make changes in the terrain or subsurface of public land,

(b) Bring structures and other things onto public land, or

(c) Remove structures and other things from public land.

Most injuries and benefits to land not taken result from the public improvement rather than from other takings for the improvement. The establishment, construction, maintenance, operation, alteration, repair or discontinuance of a public improvement may involve many changes in the land involved in the activities performed on the property owned or acquired by the taking agency over a considerable period of time. The consequences to nearby private land may be extensive. A public improvement is a source of compensable injury or deductible benefit to the extent the public agency has a right to make changes on the property or in the activities it has a right to perform. It is the right to change not the actual exercise thereof that may be a source of injury or benefit. If land is taken for the purpose of building a highway, no other use having been authorized by the order of taking, no consideration may be given by an appraiser to changes of property and activities which would take place if the agency decided instead to build some other type of improvement. However, unless the order of taking states otherwise, the agency is not required to build its highway in any specific way. For example, the fact that it plans initially to build a cement highway does not prevent the agency from ultimately using bituminous concrete. The landowner is entitled to compensation based on the scope of the rights acquired by the taking agency regardless of the actual plans

or intentions of that agency. Through the same legal reasoning the agency is entitled to the deduction of benefits based on the scope of rights acquired.

The rights acquired by the taking agency never include a right to do the work negligently or to engage in unlawful conduct. Usually damages that result from negligence or unlawful conduct are not considered by a land damage appraiser. A landowner may be able to recover such damages on the basis of other law holding contractors, actually doing construction for the Commonwealth, responsible for their negligence. In some cases the sovereign Commonwealth may accept responsibility for such damages in a manner which would permit a citizen to bring suit under §9 of Chapter 79 of the Massachusetts General Laws. The possibility that this type of situation may arise is further illustration of the necessity that an appraiser understand all of the provisions of the statutes authorizing and financing the public improvement with which he is concerned. When he has a doubt about legal responsibilities that relate to his duties he should ask his client or employer to request a formal opinion on the law from appropriate legal counsel. State departments and agencies would then request the opinion of the Attorney General if it was deemed necessary.

The changes and activities discussed in this chapter are confined to those which occur on land owned or acquired by the public agency. Resulting changes in private land constitute injuries or benefits as distinguished from the sources thereof, discussed in this chapter. Those related injuries or benefits to private property are the subjects of Chapters Eight and Nine.

§7.91 Terrain or Subsurface Changes in Public Land

Rule 52. ***Changes made in public land in connection with a public improvement may include alteration of***
(a) The surface of the land,
(b) The surface of watercourses and ponds, and
(c) The subsurface under land or bodies of water.

In most cases changes in the terrain or subsurface of land are incidental to the public improvement, e.g., the construction of a building requires excavation for the foundation. However, a change in the land may itself be the intended improvement, e.g., alteration of the grade of an existing street or highway. As possible sources of damage or benefit to land not taken other changes in the surface of the land include:

Removal or planting of trees, shrubbery, grass or other vegetation;
Cuts and embankments;
Reduction or increase in grade through filling or grading.

Possible causes of damage or benefit to land not taken from changes in surface watercourses and ponds include:

Reduction or increases of water level,
Dredging or filling of the waterbed, and
Changes in direction and rate of the flow of water.

A change in the land may occur as a more or less accidental result of a combination of some other change or activity and natural causes. An excavation in the land and natural forces may cause a shifting of subsurface soil toward the excavation or a drainage or seepage of subsurface water into the excavation.

§7.92 Structures or Other Things Brought onto Public Land

Rule 53. ***Damages and benefits from things and activities brought onto public land in connection with a public improvement include consequences of***
(a) Construction materials and equipment used on the land,
(b) Structures and other things placed on or in the land as a part of the public improvement, and
(c) Traffic attracted onto the land as a result of the public improvement.

Things put on the land for the purpose or as a result of constructing or repairing a public improvement may be sources of damage or benefit to private land by their presence and use. These

include not only equipment and construction materials, but also by-products such as trash and rubble. Mere presence is of significance in case of explosives and trash fires.

The establishment, construction or alteration or even the discontinuance of a public improvement also involves the introduction of various objects on the public land where the improvement is to be located. These could include buildings, walls, fences, canals, reservoirs, bridges, viaducts, railways, ramps, dams, dikes, docks, tunnels, drains, sewers, pipes, wires, posts, parking lots, and machinery.

Traffic and other things attracted by a public improvement may be considered as sources of compensable injury or deductible benefit only where there is an overwhelming probability, amounting almost to a certainty, that they will be so attracted. The most common example is the vehicular traffic which almost inevitably appears on a newly constructed highway. Another is air traffic on and over airports and their approaches.

§7.93 Structures and Other Things Removed from Public Land

Rule 54. ***Structure removal damage or benefits includes consequences of***

(a) Physical removal of structures and other things, and

(b) Discontinuance of their operation and use without their physical removal.

The physical removal of any large structure or other thing from nearby public land may occur in connection with the discontinuance of an existing public improvement. Removal may cause compensable injury or create deductible benefits. Often a structure is removed to make way for a new public improvement. Any of the items listed in §8.62 might be removed for these reasons.

The discontinuance of the operation and use of a public improvement on nearby land, without physical removal, may cause injuries and benefits. The disconnection of a public drain, sewer or way, for example, may have a considerable effect on the value of property with which it was formerly connected. The right to compensation for such injuries must be created by statute except in the extreme case when acts of a public authority without a formal taking may create a nuisance or servitude on land so severe that there may be a "taking" within the meaning of Article X of the Declaration of Rights in the Massachusetts Constitution.

CHAPTER EIGHT

INJURIES CAUSED TO LAND NOT TAKEN BY A PARTIAL TAKING OR BY A PUBLIC IMPROVEMENT

§8.1 Conditions Precedent to Compensation for Injury

Chapter Seven considers changes made in and activities performed on land taken or owned by a public authority. This chapter deals with the injuries to private land as a result of those property changes and activities.

Rule 55. ***An injury caused by taking a part of the property of an owner or by a public improvement on land not taken is compensable only if***

(a) The injury qualifies under the rules of direct cause and reasonably probable consequence stated in §§8.2 and 8.3 hereof; and

(b) There has been either a partial taking of property from the landowner or a statutory right to damages exists as set forth in §7.2 hereof.

An injury is not compensable unless it qualifies under the rule of direct cause and reasonably probable consequence, discussed in §§8.1 to 8.3, and unless there is either a partial taking of property from the landowner or a statutory right to damages, as discussed in §7.2.

CAVEAT: Even assuming compliance with this rule there are many additional factors governing the extent of damages recoverable. A few deal with injuries in general. The remainder are directed at particular types of injury which the appraiser may encounter.

§8.2 Temporary and Permanent Injuries

Rule 56. ***With or without a partial taking, both temporary and permanent injuries must be considered in determining damages.***

For example, while a street is under construction there may be blasting, excavating and the operation of noisy machinery which seriously affects the use of property nearby. Those injurious activities will end when construction is completed. Usually the nearby property will not be permanently damaged. However, the landowner may be entitled to compensation for such temporary injuries. Damages are recoverable in these circumstances only if there is assumption of liability for such injuries by the Commonwealth in a General Law or in the statutes authorizing and financing the improvement. (cf. Comments in §7.9 under Rule 50.)

§8.3 Injury to Real Estate

Rule 57. ***With or without a partial taking from a landowner, he is entitled to damages for injuries only to his real property.***

The only injuries entitled to consideration in an appraisal are those to real property. Injuries to personal property, however serious they may be, are never compensable in an eminent domain proceeding. This rule is analogous to Rule 9 in §3.4 that compensation for property taken is confined to property which is part of the real estate. (cf. §§3.4 **et seq.**)

An injury to business conducted on real property, as distinguished from an injury to the

real property, is not compensable. However, the market value of a commercial property may decline as a result of impairment of the business operated on the premises. If rent for premises is based on a percentage of business income, and if that rent is reduced for a significant period of time, the reduction in net rental income may reduce the fair market value of the property. If circumstances are created which permit a tenant to move without liability to the owner compensation may be proper. The availability of property for business uses is entitled to consideration by the appraiser, provided that it can be related to a decline in property value and provided that any loss of use is traceable to some other compensable injury to the real property. If, however, its decline in value for business purposes results solely from a loss of customers or business profits, such factors are not to be considered in the appraisal.

§8.4 Injury Reducing Value for Highest and Best Use

Rule 58. ***Whether or not there has been a partial taking from a landowner, he is entitled to damages only for injuries which reduce the value of his property for its highest and best use.***

Damages for injury to private property from a partial taking or a public improvement without a taking are determined by the resulting decrease in market value of the property for its highest and best use. The expressions "market value" and "highest and best use" have the same meanings in this context as for purposes of compensating the landowner for property taken. Any injury which does not have the effect of reducing the market value of the land may not be considered in the appraisal. (§§2.2, 2.4 and 2.41.)

For example, assume that the nature of the improvement interferes with the right of privacy on land not taken. If the land had little privacy before the improvement, the landowner has suffered no injury and need not be compensated. If the land is best suited to the type of industrial use where privacy is of no significance, the owner is not entitled to compensation. However, if there was considerable privacy prior to the improvement, and if privacy was a prerequisite to the best use of the property a relatively small impairment of privacy may depress fair market value and entitle the landowner to compensation.

The importance of any element of damage depends on the highest and best use of property and on its value for that use. Conclusions thereon by an appraiser must be determined in the same way and with the same documentation as the appraisal of property taken by eminent domain. The highest and best use may or may not be the use to which the land is being put at the time of the partial taking or improvement. A partial taking or public improvement may make land not taken suitable for some unforseen use, to which the land had not heretofore been devoted.

§8.5 Special and Peculiar Injury

Rule 59. ***When there has been no taking from a landowner, he is entitled to damages only for those injuries which are special and peculiar to his property.***

In case of an injury to private property, without a partial taking, damages are not recoverable unless the injury is special and peculiar to the property for which the claim is made. General injuries, affecting the public as a whole, are not compensable in this situation.

The distinction between special and peculiar injuries and general injuries may be difficult. The appraiser must determine which injuries affect the private rights of a landowner and which affect his rights only as a member of the general public. For example, the deprivation of access to an abutting public way is a special and peculiar injury because it interferes with a private right. Interference with travel along a public street is only a general injury because it interferes with a public right.

The requirement that injuries be special and peculiar is not as strict when a partial taking is involved. However, with partial takings there is some limit to the compensability of injuries affecting public rights as distinguished from private rights.

Some ramifications of the requirement of special and peculiar injury are dealt with in the discussion of particular types of injury immediately following.

§8.6 Compensability of Particular Types of Injury

Rule 60. ***Injuries which may be considered in determining damages from a partial taking or from a public improvement without a taking include***

(a) Impairment of access,

(b) Physical injuries, and

(c) Other injuries.

A single improvement on public property may be the source of many injuries to private property. For example, an increase in grade may simultaneously obstruct access, drainage and view. A checklist in §9.9 provides a basis for determining what injuries may have occurred in any given case.

For any type of injury to be compensable there must have been some diminution of the market value of real property. (cf. §§9.3 and 9.4.)

§8.61 Types of Impairment of Access

Rule 61. ***In determining damages consideration must be given to impairment of access***

(a) To public ways,

(b) To water courses or ponds, and

(c) Across private land.

A landowner whose property abuts a public way has a private right of access thereto. The owner of some portion of the bed of a watercourse or pond has a private right of access to the adjacent waters thereof. Any landowner has a private right of free passage from one part of his land to another. (cf. §§3.53 **et seq.**) Those three types of access injury and the conditions under which they may be considered in determining damages are the subject of the nine sections immediately following.

§8.62 Impairment of Access to Public Ways

The impairment of access to public ways is a common injury. It may occur either when property abuts a public street or when property is connected to a street by a private way over which he has an easement.

When it has access, there is seldom any situation in which its loss or impairment does not depress the value of property. Any limitation on freedom of access probably is a compensable injury. However, liability for compensation depends to some extent on the form in which it occurs. This type of injury arises in two forms.

(a) Impairment of access to an abutting public way, and

(b) Impairment of access to the system of public ways.

§8.621 Impairment of Access to Abutting Public Way When Partial Taking Made

Rule 62. ***When there has been a partial taking of property, impairment of access to any abutting public way must be considered in determining damages.***

When there has been a partial taking any obstruction placed between property and an abutting public way which makes it more difficult to pass from one to the other is a compensable injury. Obstructions to access are compensable whether they extend along the entire length or only part of the lot. The decisive factor is that part of the abutting property be cut off. This situation is to be distinguished from that in which the obstruction occurs elsewhere than on the lot line. Obstruction on the public way, making it inconvenient to pass from that part of the public way adjoining property to

that part adjoining neighboring property may depress the value of property. However, without more it is not a compensable injury. The right to travel along a public way is one which an abutter shares with the general public. Its impairment is considered too general for compensation upon a partial taking. This is one of the rare instances where the requirement that injuries be special and peculiar to the property affected applies to severance damage. (cf. §7.2.)

An owner may have constructed a particular means of access between his property and an abutting public way, e.g., driveway, walk or steps. If the public improvement involves removal thereof or injury thereto access may be impaired. If it is, the owner is entitled to compensation. If the means of access to a public way is through a private way over which the owner of property has an easement, any obstruction placed at any point on that private way which results in an impairment of his easement to the public way is a compensable injury.

Impairment of access by discontinuance of a public way is a compensable injury to property abutting the discontinued part. The right to compensation does not, though the amount of damages may, depend on the extent of the discontinuance, but on the fact that access is impaired to some degree. If a public way is discontinued at some point other than where it abuts property, at most general, non-compensable damage results to such non-abutting property.

Laying out a modern limited-access highway on a public way to which there was previously unlimited access deprives the abutters of legal access. It is a compensable injury.

§8.622 Impairment of Access to Public Way When No Taking Made

Rule 63. ***When there has been no taking of real property, impairment of access from property to an abutting public way may be considered in determining damages only if***

(a) There is thereby deprivation of any reasonable access to all abutting public ways, or

(b) The impairment is the result of laying out a limited access way in whole or in part on the location of an existing public way abutting the property.

When a partial taking is not involved the right to compensation for impairment of access to abutting public ways is more limited. In cases not including a partial taking impairment of access to abutting public ways may be considered only if all reasonable access to all abutting public ways is cut off. Inconvenience of access may not be considered in these cases. For example, if the property abuts on two public ways, total deprivation of access to one of them is not compensable if reasonable access to the other remains. If property previously had access to an abutting way through its entire length, reducing access to a lesser portion of this boundary line does not entitle the landowner to damages, provided the remaining access is reasonable.

As a result of a provision in the General Laws an exceptional case arises when a limited-access highway is laid out over the location of an existing abutting public way. In that case a landowner from whom there has been no partial taking may recover for an impairment of access even though there may not be total deprivation of reasonable access to all of the public ways abutting his property. The exception to the rule arises when the property of the landowner abuts on two public ways, and access is cut off to only one of them. In the ordinary case the fact that the owner retains access to the one public way left undisturbed by the public improvement would prevent recovery of damages for loss of access to the other. However, where access to one of two such public ways is cut off by reason of its being made a limited-access way, and the value of property is thereby diminished, this special rule requires that the owner be compensated.

§8.623 Impairment of Access to the System of Public Ways

Rule 64. ***Whether or not there has been a partial taking from a landowner, an impairment of access to the general system of public ways serving his property must be considered in determining damages only if he is thereby totally deprived of reasonable access to the general system.***

Ordinarily there is no recovery of damages for the obstruction or discontinuance of an abutting public way if such obstruction or discontinuance is not on the part of the way adjoining property. However, the right of access includes not only the right to pass to and from that particular way, but also the right to pass to and from the general system of public roads. Denial of that results in a compensable injury though the obstruction or discontinuance is not on that part of the way abutting the landowner's property. This applies whether or not there has been a taking of a part of the property so injured.

For example, assume that a property abuts "A" Street, and that the nearest intersections to this property are that of "A" Street and "B" Street in one direction, and that of "A" Street and "C" Street in the other. If "A" Street is obstructed or discontinued at both intersections, the landowner loses all access to the general system of public ways. That is a compensable injury though the obstruction or discontinuance of "A" Street may have occurred at points not actually touching the landowner's property. Nothing short of the assumed facts will entitle the landowner to compensation. If "A" Street has been closed down or obstructed at only one of these intersections, the injury would be general, affecting only the public right of travel. There could then be no compensation regardless of the inconvenience caused. If "A" Street had been closed at both ends, but there is a third intersection with "D" Street between property and the discontinued portions of "A" Street, through which the system of public ways could be reached, there can be no compensation. Consequences of this type arising from public improvements are referred to in the law as circuity of travel rather than loss of access. Circuity of travel is not a compensable injury even when a partial taking is involved.

Analysis of situations that may involve these factors must be thorough. Intersections left open to a property owner are of little value unless the intersecting streets lead somewhere. If "D" Street in the preceding example were only a dead end street which was not connected to the system of public ways, its availability would not prevent the landowner from recovering.

§8.624 Diversion of Traffic

Rule 65. ***Whether or not there has been a partial taking, a diversion of traffic to or from the public ways abutting or serving particular property may not be considered in determining damages.***

Diversion of traffic to or from private property is closely related both to impairment of access and to circuity of travel. However, it must be carefully distinguished from them. Diversion of traffic usually comes about as a by-product of impairment of access or circuity of travel. When the system of public ways is so laid out that it is difficult to reach certain property, traffic tends to be diverted to other routes of travel. If a property owner operates a filling station or some other retail business on his land, the consequences of such a diversion of traffic may be disastrous. However, present Massachusetts law does all compensation for injury of that type. The rationale for the law is that an owner has no legally vested right in the amount of traffic which passes property. Therefore, no right is injured or impaired if the traffic is diverted.

§8.63 Impairment of Access to a Watercourse or Pond

Rule 66. ***Impairment of access to a watercourse or pond from a privately owned portion of the bed must be considered in awarding damages when there has been a partial taking. However, if there has been no taking, an impairment of access to a watercourse or pond from a privately owned portion of the bed may be considered in awarding damages only if the owner is totally deprived of reasonable access to such watercourse or pond.***

An impairment of access between the privately owned portion of the bed and the adjoining waters in a watercourse or pond may itself be a taking of property. (cf. §§3.53 **et seq.**) Under appropriate circumstances such an injury is entitled to consideration in the appraisal whether or not a partial taking is involved. The rules in this area are analogous to those governing compensation for the impairment of access to abutting public ways, discussed in §§8.621 and 8.622.

Compensability for impairment of access to a watercourse or pond depends upon whether a right of access previously existed. The landowner must own some portion of the waterbed to have the requisite prior right of access. Without such a private right of access, no matter how extensively he may be using or depending on the watercourse, an owner cannot be compensated for any impairment of access to that watercourse. For example, this would apply in the case of an impairment of access to great ponds, that is ponds having more than ten acres of bed, since the entire bed of a great pond is publicly owned.

If a landowner does own some portion of a waterbed, consideration must be given to the effect of the injury on the market value of the property. Watercourses which are navigable may be used to travel to and from land. A watercourse may irrigate land and supply water to its occupants for drinking, swimming, irrigation and other purposes. A watercourse may be used as a source of power. It may serve as a means of carrying garbage and other waste from adjoining property. Access to a watercourse may therefore be a valuable asset to premises by which it flows. Loss or impairment of such access may diminish the value of that land.

When there has been a partial taking from the landowner in addition to a taking of access to a watercourse or pond, the owner is entitled to damages for any resulting injury to the value of his real estate. When there is no partial taking from the landowner, he cannot recover except for the total loss of reasonable access to the waters beyond his property line. These rules apply whether or not the watercourse or pond is navigable or tidal.

An impairment of such access may arise from something done to the waterbed, beyond the property line, such as the placing of fill in the waterbed, and the installation of bridges, dams, dikes, breakwaters, docks, piers, wharves, fences, walls, or barricades.

Impairment of access may also be caused by some change in the flow of the watercourse, diverting the water.

§8.64 Impairment of Navigation

Rule 67. ***When there has been a partial taking from a landowner, an impairment of navigation in a watercourse or pond in which he owns some portion of the bed must be considered in determining damages.***

An impairment of navigation through a watercourse or pond must be distinguished from an impairment of access to it. As is the right of travel on a highway, the right of navigation on a waterway is a purely public right. Injuries arising from an impairment of this right are therefore general, rather than special and peculiar. They are not compensable unless their loss is accompanied by a partial taking of real property.

§8.65 Impairment of Passage Across Private Land

Rule 68. ***Whether or not there has been a partial taking, an impairment of passage across land must be considered in determining damages.***

One of the most important rights a landowner has is the right to pass freely from one part of his land to another. Any interference with this right is certain to diminish the value of the land. This is true for virtually any use to which a tract of land may be dedicated. Access between all parts of land is essential to its use as a single piece of property. If such an interference with passage results from a partial taking or a public improvement, it is a compensable injury.

An impairment of access of this type seldom arises except when there has been a partial taking. A typical case is a taking of a strip of land running through a tract, leaving a remainder divided into two or more pieces. Passage between the remaining parts may be obstructed by the use to which the taking agency put the taken strip of land. Serious obstructions might result from the planting of trees or heavy shrubbery, excavations or changes in grade, or structures such as bridges, viaducts, trestles, buildings, fences, walls, barricades, posts, poles or ramps.

Occasionally an impairment of passage across private land occurs without any land being taken. It can develop from an injury to nearby land caused by a public improvement. For example, an impairment of drainage may cause flooding. The flooded portion of the land may become inaccessible or it may prevent access between the parts of the land lying on either side of it.

An injury to an improvement on private property, such as a walk, driveway or private bridge, which is used for access between parts of the land may also cause an impairment of passage across the land. An injury of this type occurs only when the passage affected is across private land, rather than some route open to the general public. For example, assume that the property affected consists of two parcels, divided by a railroad, but used together as a single farm with a public road providing the means of access between the parts. If the road is discontinued at the grade crossing, thereby preventing its use as an access route by the landowner, he cannot recover damages. No part of the road has been discontinued where it abuts his property. There has been no impairment of access to any public way. The only injury is an impairment of travel along the road, which is not compensable. If the discontinued road were a private way in which the landowner had an easement, the result would be different. Discontinuance of the private road would amount to an impairment of passage across his property.

§8.7 Types of Physical Injuries

Rule 69. ***Damages may be awarded for impairment of or injury to***

(a) Shape or size,

(b) Fertility of soil,

(c) Lateral or subjacent support,

(d) Drainage,

(e) Natural flow or level of water, and

(f) Vegetation, deposits and improvements.

Physical injuries to private property from a partial taking or improvement are usually compensable. The specific types of such injuries are discussed in detail in the following sections.

§8.71 Impairment of Shape or Size

Rule 70. ***Whether or not there has been a partial taking, an impairment of the shape or size of land must be considered in determining damages.***

A partial taking often leaves property in such an inconvenient shape or so reduced in size that its value for certain uses is diminished. This could also conceivably but very rarely happen without a taking. An extreme example of this type of injury is a partial taking leaving the owner with a series of tiny plots of land which is too small or oddly shaped to have any individual value. For all

practical purposes this is a taking of the entire tract. The landowner is ordinarily entitled to the full market value of all such plots.

In less extreme cases the landowner is entitled to full compensation only for the parts taken. He is also entitled to compensation for the injurious effects of the taking on the shape and size of the remaining land. Those may include the loss of anything on the land taken, important to the effective use of the land not taken. If the land before the taking contains a house and garage, a taking of the part on which the garage is located would require the owner either to build a new garage or do without. Either is a compensable injury.

Loss of use of the taken land may be compensable injury in addition to the fair market value of that land, even if it is not presently dedicated to that use. The landowner may need land for expansion of the existing use of the remaining property or for the conversion of his entire tract to some entirely new use. If the contemplated use is one to which the land is well adapted and is not merely speculative, he is entitled to compensation.

The deprivation of the right to use the portion of a privately owned waterbed of a watercourse or pond is a type of taking which may impair the shape and size of the remaining property. When such loss of use does not constitute a taking, an injury to shape and size resulting therefrom is compensable if there has been a partial taking or if the landowner has a statutory right to damages without a taking. That can occur when the waterbed lies under a navigable or tidal watercourse or pond and the public improvement causing the injury is related to navigation.

A change in shape or a reduction in size of land from a partial taking may impair lawful use. For example, if a partial taking is made for the purpose of widening a public way, existing ordinances relating to building lines and zoning might prevent the remaining land from being lawfully built upon in some desirable way. Ordinances might possibly require the removal of existing structures. An injury of this type is entitled to consideration by the appraiser to the same extent as an impairment of shape or size in the purely physical sense.

§8.72 Impairment of Fertility of Soil

Rule 71. ***Whether or not there has been a partial taking an impairment of the fertility of the soil on property must be considered in determining damages.***

The importance of fertile soil, obvious in the case of farm land, is not confined to agricultural property. Shade trees, shrubbery, lawns and gardens are important to the appearance and use of residential land, as well as to some commercial and other properties. On lands affected by winds and surface waters, vegatation may also be necessary to prevent erosion. Fertility of soil can be injured in a variety of ways. As a practical matter such an injury does not usually occur as an immediate consequence of things done to adjoining land. It develops most commonly as a result of other injuries to the property of the landowner.

Erosion or washing away of topsoil often results from loss of lateral support. It can also result from impairment of drainage or of the natural flow of a watercourse with excessive surface water loosening and carrying away the topsoil. Excessive or insufficient irrigation may be caused by an impairment or drainage or of natural flowage or subsurface waters.

A partial taking or a public improvement sometimes prevents the landowner from properly tending and cultivating his land and may thereby impair its fertility. An impairment of passage across his land can have this effect. Injury to improvements, such as drainage and irrigation ditches, may reduce fertility. When there has been a partial taking the shape and size of the remaining land may deprive the landowner of the use of green manures, stock manure or lime deposits, necessary to assure continued fertility. Effective crop rotation may be prevented by the same developments.

§8.73 Impairment of Lateral or Subjacent Support

Rule 72. ***Whether or not there has been a partial taking, an impairment of lateral or subjacent support of property must be considered in determining damages.***

An owner has the right of lateral support, that is the preservation of the surface of his land by the natural lateral support from adjoining land. If property is at the edge of a natural precipice, its neighbor has no duty to correct the situation. However, a neighbor is obligated not to worsen the situation.

Impairment of lateral support can have disastrous effects on the land from erosion of topsoil to dangerous rock-slides and cave-ins. Such an impairment is likely to depress the market value of the property for almost any use. It is compensable to that extent whether or not a partial taking is involved, provided, of course, that when there has been no taking it results from a public improvement and the Commonwealth has accepted liability in the appropriate enabling or financing statute.

Unless preventive measures are taken, the removal of trees and other deeply rooted vegetation may cause erosion. Excavation, reduction in grade or tunneling on adjoining land, blasting, deflection of a surface or subsurface watercourse, or the shifting of subsurface soil on nearby land may impair lateral support to the extent of causing damage to property.

An owner has the right of subjacent support, that is the preservation of the natural support of the surface of land by the subsurface. If subsoil consists of quicksand, peat or some other unstable substance, there is no duty to give it added support. However, a neighbor may not do anything to aggravate the situation.

Impairment of subjacent support can render property unfit for almost any use. It is compensable to the extent that is caused by a partial taking or a public improvement without a taking, assuming statutory acceptance of liability by the Commonwealth. When it occurs in an extreme form, the surface of the land cracks or caves in.

Impairment of subjacent support can result from a shifting of subsurface soil on adjoining land, or the use of explosives. Underground drains, sewers or pipes, and tunnels, built under land not taken may weaken surface strength.

§8.74 Impairment of Drainage

Rule 73. ***Whether or not there has been a partial taking, an impairment of drainage on property must be considered in determining damages.***

Drainage refers to the process by which surface waters having no definite channel are removed from land. The principal source of such surface waters is rainfall. If drainage is impaired, surface water may accumulate in damaging amounts. Such an injury is entitled to consideration in the appraisal whether or not there has been a partial taking, provided that, absent a taking, the Commonwealth has accepted liability in pertinent statutes.

Drainage may be impaired by obstruction of the flow of water away from the property, raising or lowering grade, filling or paving land, raising the level of or filling in a watercourse.

Where the landowner is dependent on artificial rather than natural means to drain water from his property, a compensable impairment of drainage arises from any interference with such artificial means by injury to the existing improvement used for drainage, or by the discontinuance or physical removal from adjoining land of some public drainage facility with which there has previously been a connection or right to connect, or by obstructing or interfering with the use of such a public drainage facility.

§8.75 Impairment of Natural Flow or Level of Water

Injuries affecting the flow or level of water in or on private property fall into two classes:

(a) Impairment of natural flow or level of water in surface watercourses or ponds, and

(b) Impairment of natural level of subsurface waters.

§8.751 Impairment of Natural Flow or Level of Water in Surface Watercourses or Ponds

Rule 74. ***Whether or not there has been a partial taking, impairment of the natural flow or level of a watercourse, or pond, over the privately owned portion of a waterbed must be considered in determining damages.***

An impairment of the natural channel, quantity and condition of the water flowing or lying over the privately owned portion of the bed of a watercourse or pond may itself be a taking. (cf. §§3.53 **et seq.**) This section considers the compensability of such an injury connected with a partial taking or arising from a public improvement, but not involving a taking. The right to damages for the latter situation depends on statutory acceptance of liability by the Commonwealth in a General Law or in the legislation authorizing and financing the improvement.

An adjacent landowner ordinarily has a private right to preservation of the natural flow and level of a watercourse and a pond to the extent of his ownership of the waterbed. Any impairment of that right is a special and peculiar injury which is compensable whether or not a partial taking is involved, and whether or not the watercourse is navigable.

A change in the course of a waterway caused by activity either on or off property, may affect its physical proximity to that property. In addition to dredging or filling such a change in course or channel may also result from the construction of a bridge, dam, dike, breakwater, dock, pier, wharf or some other structure on the waterbed.

A change in quantity of water passing over property in a watercourse or pond may also constitute an impairment of natural flow or water level. An increase in quantity may result from the filling of a waterbed somewhere off the premises, or an impairment of drainage of surface waters, or an impairment of the natural level of subsurface waters on the affected premises. In the extreme cases this form of injury causes flooding of adjoining land. A reduction in quantity of water in a watercourse or pond can result from a reduction in level or filling of the bed somewhere off the premises or from a dam or other structure upstream from the affected premises. A significant reduction in quantity of water may deprive the premises of its water supply for bathing, drinking, water power or irrigation.

Alteration of the condition of water passing over the premises from a sewer or otherwise is a compensable injury, provided that the change amounts to pollution and that pure water is needed on the premises for drinking or other purposes.

§8.752 Impairment of Natural Level of Subsurface Waters

Rule 75. ***Whether or not there has been a partial taking, an impairment of the natural level or subsurface water under property must be considered in determining damages.***

Subsurface water of the type under consideration may be referred to as the water table. It may have no definite channel or direction of flow.

An increase in the quantity or level of subsurface waters is a compensable injury if it makes the land too moist for building or farming, for comfortable occupation, or for any purpose to which the land would otherwise be suited. Such an increase may result from a shifting of subsurface soil on nearby land or from seepage from adjacent property. It may also result from some underground improvement on other land which obstructs drainage from the land affected by filling or the installation of a tunnel or foundation of a building. An impairment of natural flow or level of water of a watercourse or pond on the surface may also alter the water table to the extent that damage is caused.

A decrease in the level of the subsurface water may cause wells to dry up and the loss of the source of water for a property. That can result from a shifting of subsurface soil or drainage of subsurface waters on nearby land as well as from an excavation, or an impairment of the natural flow or level of water in a watercourse or pond.

Changes in the subsurface water level can develop from activities occuring at some distance from the affected property. That does not make them any less compensable as injuries, but often makes it difficult for the appraiser to detect them.

Pollution of subsurface water is less common. When it does occur, it is generally injurious to market value and to that extent is compensable.

§8.76 Injury to Vegetation, Deposits and Improvements

Rule 76. ***Whether or not there has been a partial taking, an injury to growing vegetation, to mineral or other deposits or to improvements in or on the property may be considered in determining damages only if the items injured are lawfully in or on the property.***

The injuries previously discussed are all injuries to the condition of the land. There may also be compensable injuries to things in or on the land. Their value may not be fully realized until their removal for use or sale, e.g., mineral deposits and crops. They may be on the land by action of the owner rather than by natural forces, e.g., some types of vegetation and all improvements. Injuries to material of this type are compensable whether or not a partial taking is involved, provided that the liability of the taking agency has been created by appropriate general or special law in the event of no taking.

§8.761 Injury to Growing Vegetation

Vegetation is most important in the case of a producing farm. It is also important in other situations where it is used to improve appearance and prevent erosion of the soil. Any injury to desirable trees, plants or shrubbery may reduce market value. Vegetation may be damaged by explosions or fires on nearby land, or even by severe vibrations or smoke from machinery. Impairment of fertility of soil or impairment of subjacent support of property might damage vegetation. Impairment of lateral support or impairment of flow of a surface watercourse not only may injure, but may cause vegetation to be carried away.

Only an injury to growing vegetation is compensable. Matured crops and plants or trees which have been severed are not part of the real estate, but are personal property. Injuries to personal property are never compensable in an eminent domain proceeding.

§8.762 Injury to Deposits

In Massachusetts there are not many deposits of natural resources of sufficient quality to justify commercial exploitation. An injury to deposits is compensable only if the land is specially suited for use as a mine or quarry. Only an injury to deposits in place is compensable. Deposits removed from the ground are personal property, injury to which is not compensable.

In appraising the value of special property such as this, the appraiser may find it necessary to employ the services of a technical expert in the field as he retains a construction engineer when using the reproduction cost method of appraisal. That technical assistance will be essential if no sales data is available.

§8.763 Injury to Improvements

Injuries to improvements to the real estate are compensable. However, there can be no recovery for injury to or loss of personal property even when the public activity makes it impossible to salvage the item of personalty from destruction. (cf. §§3.41 **et seq.**) Only those improvements which are lawfully on the land are considered compensable when injured or destroyed. If an improvement or its use violates a zoning, building or sanitary regulation, its destruction is non-compensable to the extent of its illegality.

If an improvement contributes anything to the land for the uses to which it is adapted its injury or destruction is compensable. The amount of the compensation depends on the extent of the loss, the character of the improvement and the land uses affected.

§8.8 Types of Non-Physical Injuries

Rule 77. ***Non-physical injuries to property which may be considered in determining damages include impairment of***

(a) Health, comfort and safety,

(b) Light, air and view; and

(c) Privacy.

Non-physical injuries alter the value of the property only in their effect on the people who occupy and use it. They can be regarded as injuries to people rather than as injuries to land. By impairing the occupation and enjoyment of property, however, they may diminish its value as real estate. Under appropriate circumstances such factors may be considered in the appraisal of damages.

§8.81 Special Limitations on Compensability

Rule 78. ***A non-physical injury to property may be considered in determining damages, only***

(a) To the extent that it would affect an average person occupying or using such property, and

(b) If it is severe with respect to such property.

The first of these requirements, which is sometimes referred to as the "average person rule," can best be explained by an illustration. A small street having only a limited traffic capacity built near a home would probably be considered by the owner to be a gross invasion of privacy if he happened to be a hermit. To an average purchaser the effect on privacy would be minimal. A hermit is not entitled to damages measured by the effect on his personal feelings. They are not average. He would be entitled only to such damages as an ordinary landowner would suffer. Market value, not the sensitivities and peculiarities of a particular owner, is the test.

The requirement that the injury be severe is a question of a degree. The effect of the injury on the property must be very noticeable. It must be much more serious on that property than on property in the general vicinity.

§8.82 Impairment of Health, Comfort and Safety

Rule 79. ***Whether or not there has been a partial taking, an impairment of the health, comfort or safety conditions on or affecting property must be considered in determining damages.***

Though related to actual or potential injury to persons occupying or using that land an impairment of health, comfort or safety is a non-physical injury to land.

Health, comfort and safety of occupation are important to almost all uses of property. They have greatest influence on value when property is used for residential purposes. An impairment of any one of these factors is compensable to the extent that the value of the property is thereby reduced, when a partial taking has been made, and when there has been no taking, provided the Commonwealth has accepted liability through a General Law or the statutes authorizing and financing the public improvement causing the injury.

Pollution of the atmosphere by dust, smoke and smells frequently causes impaired health and comfort. Pollution may result from the use of explosives, machinery, sewers or railways. Noise and vibrations caused by the use of explosives, machinery and traffic may also impair health and comfort. At times glaring lights, from traffic on a highway, may have the same effect.

Health and comfort also may be impaired by excessive moisture or water, arising from an impairment of drainage. An impairment of natural flow or water level may involve the denial of drinking or bathing water to the premises or the pollution of such water, either of which may impair health and comfort. An injury to vegetation on the affected premises may involve a loss of shade

trees necessary for comfortable occupation of the land. An injury to any of the improvements on property can also impair health and comfort.

An impairment of safety is often only an extreme form of an impairment to health or comfort. For example, gases released by the opening of a nearby sewer may be unhealthful, unpleasant, and poisonous. A more dramatic impairment of safety would be danger of personal injury from use of explosives and fires on nearby land. If the public improvement involves the installation of pipes carrying explosive gas or of wires carrying high-voltage current, there may also be an impairment of safety.

§8.83 Impairment of Light, Air and View

Rule 80. ***Whether or not there has been a partial taking, an impairment of light, air or view over property may be considered in determining damages.***

Interference with the light and air naturally coming onto property and with the view beyond it involves no physical harm or danger to occupants. It affects only aesthetic values. It is compensable when a partial taking has been made and when there has not been a taking provided the Commonwealth accepts liability by a pertinent general or special law.

An attractive view can be destroyed by the location near the premises of unsightly matter, such as construction material, machinery, trash and rubble, posts, poles or railroad cars. It can also be spoiled by the presence of some object which, though not necessarily unsightly itself, obstructs the view from the property, e.g., retaining wall, a building, an increase in grade.

§8.84 Impairment of Privacy

Rule 81. ***An impairment of privacy on property may be considered in determining damages only when there has been a partial taking.***

It is rare that an impairment of privacy is compensable, nothing else appearing. Privacy is ordinarily of no importance to industrial property. It may be a detriment to commercial property. Privacy may add value to residential and to certain special-use properties. It is compensable only in those cases and only when there has been a partial taking. An impairment of privacy of occupation is such a vague and intangible type of injury that the courts are usually reluctant to allow damages for it.

An impairment of privacy may take the form of the removal of some barrier such as trees or heavy foliage, a fence or wall. Privacy may also be impaired by the establishment of an improvement, such as a public building or highway, which permits people or traffic to come so close to property that diminution of privacy reduces its market value.

CHAPTER NINE

BENEFICIAL EFFECTS ON PROPERTY NOT TAKEN OF A PARTIAL TAKING OR OF A PUBLIC IMPROVEMENT

§9.1 Deductibility of Benefits

Rule 82. ***A benefit conferred on property by a partial taking or public improvement may be deducted from the damages to the property arising from the same sources to determine the compensation to which the owner is entitled.***

A benefit to private property from a partial taking or a public improvement can be regarded as the opposite of an injury to such land. An injury entitles the landowner to compensation. A benefit entitles the public agency to a reduction in the compensation to be paid.

This process of offsetting benefits against compensation occurs in its most simple form when a landowner sustains injuries without any property having been taken from him. The damages which would be payable to him in the absence of benefits are reduced to the extent of the value of the benefits. It follows that if the value of the benefits is equal to or greater than the amount of the damage, the landowner is entitled to no compensation.

When there has been a partial taking from the landowner, the treatment of benefits may be more complex. In the absence of benefits in such cases the landowner would be entitled to compensation for both the land taken and severance damages. Under Massachusetts law the value of the benefits conferred on the remaining land is deductible from the total of those two types of compensation. If the value of the benefits is equal to or greater than the sum of the value of the property taken and the damages to the remaining property, no compensation is payable.

Benefits are deductible only if certain conditions are met. Some of those limitations relate to the sources of injuries and benefits. (cf. Chapter Eight.) Others are considered below.

§9.11 Benefits to Real Estate

Rule 83. ***The only benefits which may be deducted from the compensation to which a landowner is entitled are benefits to his real estate.***

Benefits to personal property or to a business on the premises may never be offset against compensation.

§9.12 Benefits Increasing Value for Highest and Best Use

Rule 84. ***Only benefits which increase the value of the property for its highest and best use may be deducted from the compensation to which a landowner is otherwise entitled.***

§9.13 Special and Peculiar Benefits

Rule 85. ***Only benefits which are special and peculiar to a particular property may be deducted from the compensation to which the landowner is otherwise entitled from a partial taking or public improvement.***

Whether or not a partial taking is involved, only those benefits which are special and peculiar to the property involved may be considered. This special and peculiar limitation may have broader application in connection with some benefits than with injuries, where it applies only to cases not involving a partial taking.

The distinction between general benefits and those special and peculiar to a property is important only to certain types of benefits. The meaning of special and peculiar as they relate to benefits is generally similar to its meaning in the context of injuries. (cf. §8.5.) It is also subject to the same uncertainties when applied to particular cases.

§9.14 Benefits Assessed as Betterments Not Deductible

Rule 86. ***Benefits taxable to the landowner as betterments may not be deducted from the compensation to which he is otherwise entitled.***

Betterments are public charges imposed on landowners benefited by some public improvement as a means of paying for its construction. If a landowner must pay that sort of a tax, it would be inequitable to deduct the benefit from any award of damages arising from the exercise of the power of eminent domain.

§9.2 Deductibility of Particular Types of Benefits

Rule 87. ***Benefits to land which may be considered in reduction of compensation for a partial taking thereof or for construction of a public improvement include:***

(a) Improved access,

(b) Physical benefits, and

(c) Intangible benefits.

The types of possible benefits are almost as numerous as the types of injuries discussed in Chapter Eight. They may be divided into the same three categories of access, physical and intangible benefits.

It is assumed in the following discussion of each type of benefit that all the general requirements of Rules 89 through 92 have been fulfilled.

§9.3 Types of Improved Access

Rule 88. ***Improved access to property which may be considered in reduction of compensation for a partial taking or public improvement include:***

(a) Improvement of access to public ways,

(b) Improvement of access to watercourses and ponds, and

(c) Improvement of passage across private land.

Access may be improved by a partial taking or a public improvement in the same three ways in which it may be impaired. The means of improving access are set forth in the following subsections.

§9.31 Improvement of Access to Public Ways

Rule 89. ***An improvement of access to any public way abutting property must be considered in reduction of compensation for a partial taking or public improvement.***

Improved access to public ways is beneficial to most land uses. For residential property

it means better access to stores and places of employment. For commercial or industrial property it means improved access to markets and sources of supply. Improvement of access may make the property available for entirely new and more valuable uses. A benefit of this type may be considered by the appraiser only when it involves access to a public way abutting the property of the landowner.

The most obvious example of benefit from improved access to abutting public ways arises through the construction of an entirely new public way contiguous to or through property.

Access to a pre-existing way abutting the property may be improved by the removal of some obstruction such as bridges, viaducts, buildings, machinery, fences, walls, barricades, drains or drainage ditches, posts or poles, railways and ramps. The same result may arise from the elimination of some topographical obstacle by reducing or increasing the grade or by leveling previously rough or rolling land.

When a limited-access highway is laid out over a pre-existing public way, special takings may be made to provide continued access to the public highways for certain landowners whose access has been impaired by the limited-access highway. A landowner who receives such a special access facility may emerge with better access than he had before.

An improvement of access in any of these forms is a deductible benefit. This rule applies only to lands which abut on the way to which access is improved and to lands which, though not abutting, have appurtenant rights of way leading to it.

Improved access to an abutting public way is to be distinguished from improved convenience of travel along that way. The latter is merely a general benefit, effecting the landowner and the public alike. It is not deductible.

An improvement of access must be distinguished from diversion of traffic. A diversion of traffic onto a public way abutting property may greatly increase its value for commercial or industrial purposes. A diversion of traffic from an abutting way may increase the value of residential property. However, regardless of their effect on market value, benefits of this kind, without more, are purely general and not deductible.

§9.32 Improvement of Access to Watercourses and Ponds

Rule 90. ***An improvement of access to an adjacent watercourse or pond may be considered in reduction of compensation for a partial taking or a public improvement.***

Better access between property and a watercourse or pond may have such beneficial effects as providing more drinking water to the premises, improved irrigation or a supply of saleable ice. Most types of property will benefit from such improved access.

The removal of any obstruction to such access, such as a bridge, dam, dike, breakwater, dock, pier, wharf, fence, wall, barricade, or other marine structure, may result in an improvement enhancing market value. Improved access may also result from dredging a waterway or changing its course or increasing its level. Construction of a canal or reservoir, enlargement or relocation of an artificial body of water already in existence may also bring about improved access to water.

Improved access to a watercourse is ordinarily a deductible benefit whether or not the landowner has any property rights in the bed. The mere fact that land is adjacent to water confers a physical advantage over the general public in using that water, even if the entire bed is publicly owned. If the waterbed in front of the premises is privately owned, however, the landowner has no right to use or take the water even as a member of the general public unless he has an appropriate easement. In that case he enjoys no benefit from the improved access to it, and no deduction may be made from his award.

While improved access to a watercourse is a deductible benefit, improved navigation through it is not. The latter is only a general benefit, shared with the public at large. It is not deductible even if it greatly increases the value of the land.

§9.33 Improvement of Passage Across Private Land

Rule 91. ***Facilitation or improved means of passage across the property of the landowner may be considered in reduction of compensation for a partial taking or public improvement.***

Facilitation or improvement of means of passage across the property of the landowner is less common than an impairment of such passage. When improvement occurs it is likely to increase the value of the land for virtually any use. One situation in which such a benefit may occur is when a public improvement previously dividing property is removed and or replaced by something less of an obstruction to passage. The removal of bridges, viaducts, trestles, buildings, drainage ditches, fences, walls, barricade, ramps, posts or poles could have that effect. Pre-existing obstruction to passage may consist of some feature in the contour of the land. Access might be improved by a change in grade, filling, grading or paving. The removal of heavy underbrush or trees might produce the same result. If parts of the land were separated by a waterway, the filling of the watercourse, the erection of a bridge, a change in its course or a reduction in its level may improve passage across it.

An improvement in passage may result from some change in the condition of the property remaining after a taking. Better drainage or an improvement of the natural flow or level of water might make portions of land drier and more passable.

The public agency is entitled to a deduction for the value of all such benefits.

§9.4 Types of Physical Benefits

Rule 92. ***Physical benefits to property which may be considered in reduction of compensation for a partial taking or public improvement may relate to***

(a) Fertility of soil,

(b) Lateral or subjacent support,

(c) Drainage, or

(d) Natural flow or level of water.

An improvement in the fertility of the soil usually increases market value. Public activities on nearby land may change the character of the soil in a manner which improves fertility. When land is taken for the purpose of planting grass or trees, such as for slope easements beside a highway, the public agency may use various means to improve the fertility of that land. Those activities, as well as the planting itself, may produce chemical changes in the property nearby which make it more fertile. An improvement of drainage as well as an improvement of the natural flow or level of water on property may aid fertility by reducing or increasing water content and supply. An improvement of passage across the property of the landowner may permit him to cultivate certain parts of his land more fully with a resulting improvement in their fertility.

Any such improvement of fertility is a deductible benefit to the extent that it increases market value.

§9.41 Improvement of Lateral or Subjacent Support

Rule 93. ***An improvement of lateral or subjacent support of the property of the landowner may be considered in reduction of compensation for damages arising from a partial taking or public improvement.***

An improvement of lateral or subjacent support rarely results from a partial taking or a public improvement. When it does occur it almost invariably increases the value of the land affected and is deductible to that extent.

Any change in adjacent land which tends to prevent the affected land from sliding or eroding outward involves an improvement of lateral support. The planting of deep-rooted vegetation, raising of the grade or construction of a retaining wall including the foundation of a building may have this effect. The filling or paving of nearby land may also serve this purpose. Where lateral sup-

port has previously been threatened by the current of a watercourse washing against the bank, the filling of that watercourse, a reduction in its level or a change in its course may improve lateral support.

When lateral support on part of land is endangered prior to the improvement by some defect in subjacent support elsewhere on the property, an improvement of that subjacent support may improve the lateral support.

Improved subjacent support may result from the filling of tunnels and drains underneath the property of the landowner, if such tunnels or drains previously caused some weakening of support. An improvement of subjacent support may also come about from an improvement of lateral support or from an improvement of natural flow or level of water on the land affected.

§9.42 Improvement of Drainage

Rule 94. ***An improvement of drainage on the property of the landowner may be considered in reduction of compensation for damages arising from a partial taking or public improvement.***

The drainage of rainwater and other freely flowing surface waters is important to the value of property for almost any use. When such drainage is improved by some activity of the taking agency, a deductible benefit is conferred. The most common cause of an improvement of drainage is the construction of a drain, drainage ditch or sewer by the taking agency, which is available for use by neighboring land. The whole purpose of some public works may be to confer such a benefit. Improvement of drainage, however, may happen more or less accidentally by a reduction in grade or an excavation made for other reasons. The removal of some natural or man-made obstruction to drainage may also confer such a benefit. Examples include the grading down of natural obstructions and the removal of buildings, walls and dams. The reduction in the level of a watercourse may improve the drainage of subsurface waters off property.

§9.43 Improvement of Flow or Level of Water in Watercourses or Ponds

Rule 95. ***An improvement of the flow or level of water in a surface watercourse or pond over the portion of a privately owned waterbed may be considered in reduction of compensation to contiguous property under the same ownership for damages arising from a partial taking or public improvement.***

The right to the natural flow and level of water of a watercourse or in a pond exists only where the watercourse or pond lies on some part of the land being appraised. If the public activity results in any improvement of the level, course or condition of the water as it flows over his portion of the waterbed the property owner receives a deductible benefit to the extent that the value of his property is thereby increased. This must be distinguished from an improvement in flowage or water level over some part of the waterbed not owned by the owner of the property under consideration. In that case of public or other private ownership of the waterbed only a general benefit would be conferred.

This type of benefit may take the form of an increase or decrease in water level or a change in course or current. It differs only in degree and effect from an impairment of flow or level, generally arising from the same causes. (cf. §8.751.) A change in the course or quantity of water may amount to an injury in one situation and a benefit in another, depending on the character of the property involved and the use to which it is or may be dedicated.

A change of the natural flow or level of water may also take the form of an improvement in the condition of the water from discontinuance of a sewer or some other public or private work which previously polluted the water upstream or from the installation of a water purification facility.

§9.44 Improvement of Level of Subsurface Water

Rule 96. ***An improvement in the level of waters beneath the surface of property of a landowner may be considered in reduction of compensation.***

An improvement in the quantity or condition of waters under the property of the landowner is likely to increase its value. Any such increase is a deductible benefit.

Changes in the water level which cause injury to the land are discussed in §8.752. The same changes may benefit the property, depending on their degree and on the character of the property before the change occurs. An improvement in the condition of subsurface waters is not common. If such an improvement occurs it ordinarily increases the value of the land. To that extent it is deductible.

§9.5 Types of Intangible Benefits

Rule 97. ***Intangible benefits to property which may be considered in reduction of compensation include improvement of***

(a) Health, comfort and safety,

(b) Light, air and view,

(c) Privacy.

Intangible benefits affect the value of property by affecting the people who occupy or use it. The deduction of non-physical benefits is more restricted than in the case of physical benefits. Certain intangible benefits are deductible only when there has been a partial taking. All such benefits are subject to the "Average Person" rule discussed in §9.51.

§9.51 The "Average Person" Rule

Rule 98. ***An intangible benefit to property may be considered in reduction of compensation only to the extent that it would affect an average person occupying or using such property.***

An intangible benefit is deductible only to the extent that it has a beneficial effect on a normal or average occupant or user of property regardless of how it may affect its actual occupants or users. If a benefit would affect an average user, it is deductible though not appreciated by those occupying or using the land.

It is assumed in the discussion of particular benefits in the sections which follow that the average person requirement has been fulfilled.

§9.52 Improvement of Health, Comfort and Safety

Rule 99. ***When there has been a partial taking from a landowner, an improvement of health, comfort or safety on his property may be considered in reduction of compensation to the extent that such improvement is caused or increased by changes made or acts performed at least in part on land taken from him.***

Improvement of health, comfort or safety benefits are deductible only when there has been a partial taking from the landowner and only to the extent that the benefit is created or increased by changes made or acts performed on the land taken from the owner of the remainder. If those conditions are absent such benefits are general and are not entitled to consideration.

The removal by the taking agency of anything which has previously impaired health or comfort on the affected premises results in a benefit of this type. That which is removed may be of a public nature, such as a sewer, railway or highway to the extent that it previously produced smells, smoke, dust, noise, vibrations or other such annoyances. It may be some private improvement located nearby, such as a private railway, factory or piggery.

If the land has previously suffered from excess moisture or surface water, an improvement of its drainage or of the level of its subsurface waters may improve health and comfort. When there is a change of the natural flow or level of water reducing pollution of the water an improvement of health and comfort usually results.

Improved safety may come about through the construction of some barrier against a hazard on or near the affected property, such as a fence, wall or barricade, which protects occupants from a nearby railway or highway. The removal of a hazard will also improve safety. The filling of a deep cut is an example as would be removal of pipes containing explosive gas or wires carrying a high-voltage current.

§9.53 Improvement of Light, Air and View

Rule 100. ***Improvement of light, air and view over property may be considered in reduction of compensation, but only to the extent that such improvement is caused or increased by changes made or acts performed on land taken from the owner or by changes made or acts performed at or near the property line of adjacent land not taken from the owner.***

An improvement of light, air or view is treated as a special and peculiar benefit only if it occurs on adjacent property at or very near the boundary line of the property affected. If there has been a partial taking any such changes made by acts performed on the land taken also may qualify as special and peculiar benefits.

Benefits of this type have a significant effect on market value only in the case of residential and certain commercial properties and then relatively infrequently.

Light, air or view may be improved by the removal of some unsightly object near the premises or by the removal of some obstruction to an attractive view beyond. Either or both results may come about through a reduction in grade or from the removal of bridges, viaducts, trestles, buildings, fences, walls, posts, poles, railways, ramps or overhead wires. The removal of some object from nearby private land, such as an outhouse or some other unattractive structure, may produce the same result. Light, air and view may also be improved by planting vegetation or constructing an artificial pond or other attractive improvement near the affected premises. The paving of an ugly dirt road can also have this effect.

§9.54 Improvement of Privacy

Rule 101. ***When there has been a partial taking from a landowner, an improvement of privacy on his property may be considered in reduction of compensation to the extent that it is caused or increased by changes made or acts performed on land taken from him.***

Privacy is an important element of value to residential property, but rarely for other types of property. An improvement of privacy seldom occurs as a result of a partial taking or public work. It will infrequently be of importance in making the appraisal.

An improvement of privacy is regarded as a special and peculiar benefit only when there has been a partial taking from the landowner and only to the extent that the benefit is caused or increased by changes made or acts performed on the land taken from him. Improvement of privacy may be considered by the appraiser only when both of those conditions are met.

One way in which privacy may be increased is by the placing of some barrier at the edge of the property, such as heavy vegetation, a fence, wall or barricade. It may also be increased by the discontinuance of some improvement which previously attracted large numbers of people, such as buildings of certain types, railways, streets and highways.

CHAPTER TEN

METHODS OF DETERMINING COMPENSATION FOR DAMAGES FROM PARTIAL TAKINGS AND FROM PUBLIC IMPROVEMENTS WHEN NO PROPERTY IS TAKEN

§10.1 The "Before and After" Rule

Rule 102. ***The amount of compensation for a partial taking or for damage to property not taken is the difference between the market value of property before the taking or improvement and the market value of the property remaining after the taking or improvement.***

In Chapters Eight and Nine the various types of injuries and benefits which may arise from a partial taking or a public improvement are set forth with some detail. To determine the injuries and benefits involved in a particular case the appraiser must first consider them individually. However, to determine compensation he must consider their aggregate effect on the total market value of property rather than each injury or benefit as a separate element of damage. The fundamental guide to valuation in these cases is the so-called "before and after" rule stated in Rule 109. The amount of compensation for property affected by a partial taking or public improvement is the diminution in its market value. The purpose of this chapter is to set forth the application of the "before and after" rule to particular cases and the important exceptions to that rule which must be reflected in the appraisal whenever they apply.

§10.2 Methods of Determining Market Value

Rule 103. ***The determination of market value under the "before and after" rule is based on the same methods used in determining the market value for purposes of a total taking of property:***

(a) The sales method,

(b) The capitalization-of-net-income method, and

(c) The reproduction cost method. (cf. §§6.1 et seq.)

When there has been a partial taking, the appraiser should first determine the value of the entire tract before the taking by the applicable accepted methods of appraising market value. By the same appraisal procedure determination should then be made of the market value of the remaining property after the taking, if there has been a partial taking, or after completion of the public improvement if there has been no physical taking. The difference between these two values is the amount of total compensation allowable. It will include compensation for the property taken and severance damages less benefits to be deducted from the sum of the damages.

When there has been injury to private property without a taking of any real property the same basic appraisal procedure must be followed.

§10.3 Alterations in the Premises to Minimize Injuries and Maximize Benefits

One aspect of appraisal by the "before and after" rule that does not arise in determining compensation for a total taking is consideration of alterations of the premises which are or ought to be made to lessen potential injuries or to make available potential benefits.

The injurious effects of a partial taking or a public improvement on land not taken may be reduced or totally eliminated by some alteration on the property to adapt it to the new situation. An impairment of lateral support could be offset by increasing the grade of the land or by building a retaining wall. An impairment of access to an abutting public way could be corrected by a change in grade or the construction of a driveway or access ramp. The level of a building could be raised to avoid an impairment of light, air and view. A fence or wall could be built to compensate for a loss of privacy or safety.

Potential benefits to land not taken may not be realized unless certain alterations are made. For example, the improved drainage made possible by the construction of a nearby public drain or sewer is of no use to the landowner unless he invests in the necessary facilities to connect his land to it. It may be advisable to move certain improvements away from the premises in order to prevent their injury or to permit some alteration in the premises. If part of a building rests on land which is taken, and the demolition of that part would expose machinery within the building to injury, it may be necessary to remove the machinery from the building until the building can be remodeled to meet the new situation.

A taking or improvement may render property completely unsuitable for the use to which it has been devoted. It may then be prudent to remove permanently various improvement for use elsewhere. In other circumstances, it may be advisable to move a structure from one part of the premises to another.

An alteration made to protect property from injury or to make available a benefit may have injurious or beneficial side effects. A new driveway or walk built to correct an impairment of access may require the destruction of trees, constituting an injury to vegetation adversely affecting market value. The diminution in value caused by removing the trees may be slight in comparison to the increase in value by elimination of the impairment of access which would otherwise occur. The driveway or walk could be intrinsically beneficial simply because a new or better driveway or walk may itself increase the value of the property.

All such alterations and their effects must be considered in determining the value of the property after the partial taking or public improvement has been made including the cost of alterations to the owner. However, that cost is not simply added to the compensation as a separate element of damages. As are the items of injury sustained it is dealt with as another factor affecting the price which a willing buyer would pay to a willing seller for the unaltered premises. Often the taking agency makes certain appropriate alterations to the private property. In that case the cost to the owner is not significant.

Alterations, their costs and other effects are considered only if two requirements are fulfilled:

1. The alterations may apply only to the real estate. The cost of repairing, removing or otherwise altering personal property may not be considered.
2. The alterations must be reasonably necessary to solve the problem. When there are two or more equally effective ways of lessening injuries or obtaining benefits, it is not reasonable to choose the most costly alternative. When the cost of the least expensive alternative exceeds the gain to be derived from making the alteration, it is unreasonable to make any alteration. If the taking agency is to pay for an alteration, it must be economically justified in light of all the circumstances.

§10.4 Allowance for Non-compensable Injuries and Non-deductible Benefits

Rule 104. ***Compensation under the "before and after" rule must be reduced to the extent that market value is affected by non compensable injuries and must be increased to the extent that such value is affected by nondeductible benefits.***

Though it is the fundamental guide for measuring compensation in cases involving injuries or benefits to property not taken, the "before and after" rule must be adjusted to distinguish between compensable and non-compensable injuries and between deductible and non-deductible benefits. As indicated in Chapters Eight and Nine, there are injuries and benefits which are not legally entitled to consideration regardless of their effect on market value. That is particularly pertinent in cases not involving a partial taking. The effect of such non-compensable injuries and non-deductible benefits must be eliminated from the valuation process. In his report the appraiser must consider all injuries and benefits and distinguish between the effects which are entitled to consideration and those which are not. This may require first establishing an amount of compensation by the "before-and-after" procedure, which then must be adjusted by deducting the effects of non-compensable injuries and adding the effects of non-deductible benefits.

§10.5 Allowance for Temporary Injuries

Rule 105. ***Compensation under the "before and after" rule must be increased by damages for temporary injuries.***

Temporary injuries create the same right to damages as permanent injuries, provided they meet all other appropriate tests set forth in this manual (§8.2). However, by their very nature, temporary injuries are not reflected in a permanent decline in market value. The amount of damages caused by temporary injuries must therefore be computed independently. It is added to the basic amount of compensation determined by application of the "before and after" rule. When property is rented, there may be a temporary loss of rental income. That would provide one measure of compensation, provided the loss of income arose from injuries which are compensable. Affected property may be leased to tenants, who must move out because of the construction of the public improvement. In such cases the actual loss of rent, if it arose from compensable injuries, would provide an accurate basis to measure the injury to the landowner. Temporary injuries may also be reflected in reduced rent or in operating and maintenance costs of the premises. In order to prevent his tenants from moving out during construction of the public improvement, the landowner might find it advisable to continue operating the property for their benefit, but at increased cost or at a reduced rental. Consideration may not be given to any increased expense of operating a business on the land, but only to increased expense of operating the real property.

Whether temporary injuries are reflected in loss of rent or in increased operating expenses, the basis for the measure of compensation is a loss of net rental income. The same appraisal principle applies when the property is not actually rented. The appraiser must determine the effect of the temporary injuries on fair net rental value as if the property had been rented.

Whether actual or supposed, such temporary losses in net rental income are determined in the same way and are subject to the same requirements as the net income method of determining fair market value. (cf. §§6.32 **et seq.**) In the cases of temporary losses, however, the net rental income is not capitalized. The appraiser is concerned only with the net rental loss to the premises for the duration of the temporary impairment of use.

§10.6 The "Before and After" Rule Adjusted

In summary, the measure of compensation in eminent domain cases involving injury or benefit from a partial taking or public improvement to property not taken is expressed by the following formula:

Market value of the entire tract before the partial taking (if any) and the public improvement

minus

Market value of the property remaining after the partial taking (if any) and the public improvement

minus

Decrease in market value due to non-compensable injuries

plus

Increase in market value due to non-deductible benefits

plus

Loss in fair net rental value due to temporary injuries

equals

TOTAL AMOUNT OF COMPENSATION FOR DAMAGES ARISING FROM EXERCISE OF POWER OF EMINENT DOMAIN

CONSTITUTION OF UNITED STATES

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF MASSACHUSETTS

DECLARATION OF RIGHTS

ARTICLE X: Right of protection and duty of contribution; taking of property, consent to laws; taking of property for highways and streets

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

MASSACHUSETTS GENERAL LAWS

CHAPTER 40
POWERS AND DUTIES OF CITIES AND TOWNS

§14 Purchase of Land; Conditions; Limitations

The aldermen of any city, except Boston, or the selectmen of a town may purchase, or take by eminent domain under chapter seventy-nine, any land, easement of right therein within the city or town not already appropriated to public use for any municipal purpose for which the purchase or taking of land, easement or right therein is not otherwise authorized or directed by statute; but no land, easement or right therein shall be taken or purchased under this section unless the taking or purchase thereof has previously been authorized by the city council or by vote of the town, nor until an appropriation of money, to be raised by loan or otherwise, has been made for the purpose by a two thirds vote of the city council or by a two thirds vote of the town, and no lot of land shall be purchased for any municipal purpose by any city subject to this section for a price more than twenty-five per cent in excess of its average assessed valuation during the previous three years.

CHAPTER 43
CITY CHARTERS

§30 Purchase or Taking of Land

At the request of any department, and with the approval of the mayor and city council under Plan A, B, C or F, or with the approval of the city manager and the city council under Plan D or E, the city council may, in the name of the city, purchase, or take by eminent domain, under chapter seventy-nine, any land within its limits for any municipal purpose. Whenever the price proposed to be paid for land for any municipal purpose is more than twenty-five per cent higher than its average assessed valuation during the previous three years the land shall not be purchased, but shall be taken as aforesaid. No land shall be taken or purchased until an appropriation by loan or otherwise for the general purpose for which land is needed has been made by the city council, by a two thirds vote of all its members; nor shall a price be paid in excess of the appropriation, unless a larger sum is awarded by a court of competent jurisdiction. All proceedings in the taking of land shall be under the advice of the law department, and a record thereof shall be kept by said department.

MASSACHUSETTS GENERAL LAWS

CHAPTER 79
EMINENT DOMAIN

§1. Order of Taking; Contents

The taking of real estate or of any interest therein by right of eminent domain may be effected in the following manner. A board of officers upon whom authority to take real estate by eminent domain on behalf of any body politic or corporate has been conferred by law, having first complied with all the preliminary requisites prescribed by law, may adopt an order of taking, which shall contain a description of the land taken sufficiently accurate for identification, and shall state the interest therein taken and the purpose for which such property is taken, and in case such taking is for an improvement for which betterments may be assessed shall state whether betterments are to be assessed therefor. In case there are trees upon the land taken, or structures affixed thereto, the order of taking shall state whether the same are to be included in the taking, and, if they are not so included, shall allow the owner a reasonable time after the date of the order or after entry or possession to remove the same, to be specified in the order.

§2. Officials Authorized to Exercise Eminent Domain

Where no other provision is made by law, a taking of land by eminent domain by or on behalf of the commonwealth shall be made by the governor and council, a taking by or on behalf of a county by the county commissioners of such county, a taking by or on behalf of a city by the aldermen, a taking by or on behalf of a town by the selectmen, a taking by or on behalf of a district by its prudential committee, and a taking by or on behalf of a private corporation by its board of directors.

§3. Recordation of Taking Order; Procedure to Acquire Possession

The board of officers by whom an order of taking has been adopted under section one shall within thirty days thereafter cause a copy thereof, signed by them or certified by their secretary or clerk, or, in case of a taking by or on behalf of a city by a board of officers having no secretary or clerk, certified by the city clerk, to be recorded in the registry of deeds of every county or district in which the property taken or any of it lies. The copy of an order of taking made under chapter one hundred and fifty-nine in connection with proceedings thereunder to abolish grade crossings by the department of public works, or by the department of public utilities, may be filed and recorded without the payment of any fee therefor. Upon the recording of an order of taking under this section, title to the fee of the property taken or to such other interest therein as has been designated in such order shall vest in the body politic or corporate on behalf of which the taking was made; and the right to damages for such taking shall thereupon vest in the persons entitled thereto unless otherwise provided by law.

If the person in possession of property which has been taken in fee, or in which an easement has been taken, by eminent domain under this chapter refuses to permit the body politic or corporate by which the taking was made to enter thereon and take possession thereof or to exercise its rights under the taking after thirty days' notice in writing sent to him by registered mail or posted upon the property so taken or in which an easement has been so taken, the board of officers having the direction and control of the public improvement in connection with which the taking was made may issue its warrant to the sheriff of the county in which the property is situated or to his deputy directing him to make entry on the property so taken and to take possession thereof or of the easement therein which has been taken on behalf of said body politic or corporate, and such sheriff or his deputy shall forthwith execute said warrant using such force as he may deem necessary for the purpose.

§4. Taking Registered Land

If land of a registered owner, or any right or interest therein, is taken by eminent domain the board of officers by whom the taking is made shall file for registration in the proper registry district a description of the registered land so taken, giving the name of each owner thereof, referring by number and place of registration in the registration book to each certificate of title, and purpose. A memorandum of the right or interest taken shall be made on each certificate of title by the assistant recorder. If the fee simple of part of the registered land is taken a new certificate shall be entered to the owner for the land remaining to him after such taking. All fees on account of any memorandum of registration or entry of new certificates shall be paid by the body politic or corporate which takes the land.

§5. Taking of Land Already in Public Use

No portion of a state institution shall be taken for a public way, canal, railroad or railway without leave of the general court specially obtained. No portion of a highway, public building or cemetery shall be taken for railroad purposes outside the limits of the route fixed for such railroad without the consent of the town in which the land sought to be taken is situated. No portion of the land taken for or held as a park by a town under chapter forty-five shall be taken or used for a public way, canal, railroad or railway, or for altering or widening the same, without the approval of the board having control of the public parks of such town. No portion of a common or park dedicated to the use of the public, or appropriated to such use without interruption for a period of twenty years, shall be taken or used for a public way, canal, railroad or railway, or for altering or widening the same, except with the consent of the city or town in which such common or park is situated after public notice, given in the manner provided in cases of the laying out and alteration of highways, stating the extent and limits of the portion thereof proposed to be taken. Such consent shall be expressed by a vote of the inhabitants, if ten or more voters file a request in writing to that effect with the selectmen or aldermen without thirty days after the publication of the notice; in the absence of such request, consent shall be presumed. In a city such vote shall be taken by ballot on a day appointed for the purpose by the aldermen, which may be the day of any election. Notice that such vote is to be taken with a statement of the question to be voted upon shall be given by the aldermen in the manner provided by law for giving notice of city elections, fourteen days at least before the day appointed therefor, and all provisions of law relative to elections consistent herewith shall be applicable to such vote, and a certificate of the result shall be recorded by the city clerk.

§5A. Historic or Ancient Landmarks; Taking

No historic landmark certified under the provisions of section twenty-seven of chapter nine and no property owned, preserved and maintained by any historical organization or society as an ancient landmark or as property of historical or antiquarian interest shall be taken without leave of the general court specially obtained.

§5B. Agricultural Land

No property used for agricultural purposes shall be taken without the consent of the owner thereof, except after a hearing by the board at which such owner shall be entitled to be heard and allowed to introduce evidence that other land not used for agricultural purposes is available for the public use for which it is intended to take his property. The provisions of this section shall not apply to takings by any agency in behalf of the commonwealth, or to takings for highway purposes, or to takings authorized by the department of public utilities except that in such takings notices of hearings required by section seventy-two of chapter one hundred and sixty-four shall be sent to all interested parties.

§6. Taking by Public; Award of Damages; Amendment of Award; Payment

When a taking is made on behalf of a body politic or corporate other than a corporation described in section seven, the board of officers by whom the order of taking is adopted shall, at the

time of the adoption thereof, award the damages sustained by every person in his property by reason of such taking. Such award may be amended by said board of officers at any time prior to the payment thereof by reason of a change in ownership or value of said property before the right to damages therefor has become vested or for other good cause shown. Such damages shall be paid by such body politic or corporate unless other provision is made by law.

§6A. Moving Costs

Any person lawfully occupying real property who is displaced therefrom and caused to move as a result of a taking of such property by eminent domain, shall be paid by the body politic or corporate on behalf of which the taking is made, unless other provision is made by law, the reasonable and necessary expenses incurred by him, as determined by said body, in moving his personal property to another location within the commonwealth, but in no event shall such amount exceed two hundred dollars in the case of an individual or family occupying such real property as a dwelling. or three thousand dollars in the case of any person occupying such real property for business purposes, or for the purposes of operating a farm or non-profit organization.

§7. Taking by Private Corporations; Award of Damages; Time of Payment

When a taking is made on behalf of a railroad corporation, the damages shall be awarded by the county commissioners of the county in which the land taken lies, upon the petition of such corporation or of any person entitled thereto, if filed within one year of the date when the taking is recorded. When the taking is made on behalf of a private corporation other than a railroad corporation the damages shall be awarded by the aldermen of the city, or the selectmen of the town, in which the land taken lies, upon the petition of such corporation or of any person entitled thereto, if filed within one year of the date when the taking is recorded; provided, that there shall be no award of the damages caused by the taking of land or other acts performed in the abolition or alteration of a grade crossing under chapter one hundred and fifty-nine, but the amount of such damages may be agreed upon by the party primarily liable therefor and any person entitled thereto. A petition for an award of damages under this section may be filed in the office of the board having jurisdiction of the subject matter thereof at any time within the period herein limited, but no petition shall be received or damages awarded under this section after a petition with respect to the same subject matter has been filed in the superior court under section fourteen.

§7A. Appraisal as Pre-requisite to Payment of Damages

An award of damages made pursuant to section six or section seven shall not be made until at least one appraisal has been made in accordance with section twelve on behalf of the taking authority and filed therewith.

§7B. Execution of Necessary Documents; Time of Issuance of Checks

Immediately after the right to damages becomes vested, the board of officers who have made a taking under this chapter shall do all things and execute all documents necessary and within their lawful authority for the prompt payment of all damages awarded in the order of taking. In the event that authority to make or approve such payments, or to perform any act necessary thereto, is conferred by law upon any person other than said board of officers, such person shall do all things and execute all documents necessary and within his lawful authority for such prompt payment. Any check for the payment of such damages shall be issued either within sixty days after the right thereto becomes vested, or within fifteen days after demand therefor by any person entitled thereto is made, as said board of officers shall determine, and shall, except as provided in section seven D, be made immediately available to the persons entitled thereto at such time and place as may be designated by said board of officers.

§7C. Notice of Taking and Amount of Damages; Contents; Service

Immediately after the right to damages becomes vested, the board of officers who have made a taking under this chapter shall give notice thereof to every person, including every mortgagee of record, whose property has been taken or who is otherwise entitled to damages on account of such taking. Such notice shall be in writing and shall describe in general terms the purpose and extent of the taking, and shall state the amount of damages, if any, awarded for such taking and the time and place at which he may obtain payment thereof, or, if no damages have been awarded, the time within which he may petition for an award of the same, and in either case the time within which he may request an offer under section eight A and the time within which he may petition the superior court to determine his damages under section fourteen. Such notice may be served by personal service, or by leaving an attested copy thereof at the last and usual place of abode of the person to be notified if he is a resident of the commonwealth, by any person authorized to serve civil process, or notice may be given to persons within or without the commonwealth, by registered mail or other suitable means. Failure to give notice shall not affect the time within which a petition for damages may be filed, except as provided by section sixteen.

§7D. Unknown Persons or Persons Under Legal Disability; Manner of Payment of Damages; Apportionment of Damages; Deposits

If the board of officers by whom a taking has been made is unable, upon reasonable investigation, to determine the name of any person entitled to damages awarded under section six, or if said board of officers determines that any person entitled to such damages is under a legal disability from receiving payment thereof, any check on account of such damages shall be made payable to the superior court of the county in which the property taken or injured was located for the benefit of the person entitled thereto. If said board of officers determines that damages awarded under section six must be apportioned between two or more persons having an estate or interest in a single parcel of land, any check on account of such damages may be made payable to the superior court of the county in which the property taken or injured was located for the benefit of the persons entitled thereto. Said board of officers shall file, in the superior court of any county in which a petition under section fourteen may be brought, a petition for leave to deposit the amount of such damages in a savings bank or other like institution, or in savings accounts in a trust company, or to invest the same in share accounts of a federal savings and loan association or a savings and loan association located in the commonwealth, as the court orders, to accumulate for the benefit of the person entitled thereto, and the court shall, after such notice as it may order, direct such amount to be so deposited or invested. Such deposit or investment shall be made in the name of the superior court and shall be subject to the order of the superior court as hereinafter provided. The board of officers making such deposit or investment shall file in the superior court a memorandum thereof, with the original certificates or other evidences of title thereto, which shall be allowed as a sufficient voucher for payment of such amount. When the person entitled to such amount or any portion thereof satisfies the court of his right to receive it, the court shall, after such notice as it may order, cause such amount or such portion thereof, or the proceeds of its investment, to be transferred to him. Amounts deposited or invested under this section shall be subject to the provisions of chapter two hundred A of the General Laws, relating to abandoned property, and the clerk of court shall, in so far as practicable, make such reports and give such notice concerning the same as are required respectively by sections seven and eight of said chapter two hundred A. No action by a taking authority under the provision of this section shall be construed so as to prevent or delay the operation of section sixteen.

§7E. Unclaimed Checks

If any check issued in accordance with section seven B remains unclaimed by any person entitled thereto for a period of sixty or more days after notice to such person in accordance with section seven C, such check shall be withdrawn and a new check issued in like amount. Such new check shall be made payable to the justices of the superior court, and shall be deposited, held and disposed of in accordance with section seven D.

§7F. Copies of Notice or Petition; Sending to Tax Collectors

The board of officers shall, immediately upon giving notice in accordance with section seven C or upon filing a petition in accordance with section seven D, send a copy of such notice or such petition, as the case may be, to the collector of taxes of the city or town in which the land to which such notice or petition pertains is located.

§7G. Receipt of Payment or Deposit; Effect; Recovery of Interest; Refund of Overpayment; Recovery of Payment Made to Person Not Entitled Thereto

A person who receives a payment in accordance with section seven B, or who withdraws an amount deposited in accordance with section seven D, may accept the same without prejudice to or waiver of any right to claim a larger sum by proceeding before an appropriate tribunal. No interest shall be recovered except upon such amount of damages as shall, upon final adjudication, be in excess of the amount of such payment or amount deposited.

In the event that the amount of such payment or deposit shall prove to be in excess of damages subsequently assessed by an appropriate tribunal, the petitioner shall be ordered by a proper decree to refund to the body politic or corporate an amount equal to the difference between the amount of such payment or deposit and the damages subsequently assessed, plus costs and interest at the rate of six percent per annum from the date as of which damages were assessed.

In the event that a payment is made to a person not entitled thereto, the body politic or corporate may recover the same from such person in an action at law or by bill in equity, and the board of officers, upon recovery of such payment, shall dispose of the same in accordance with section seven B or section seven D, as said board of officers shall determine.

§8A. Offer of Settlement; Payment Pro Tanto; Refund of Excess

A board of officers who have made a taking under this Chapter may at any time after the right to damages for such taking has become vested, and, if so requested by a person entitled to damages at any time after the right to damages has become vested, shall before the expiration of nine months after the right to damages vested or, in the case of a request made more than three months after such request, offer in writing to every person entitled to damages on account of such taking a reasonable amount which such board is willing to pay either in settlement under section thirty-nine of all damages for such taking, with interest thereon and taxable costs, if any, or as a payment pro tanto which may be accepted and collected forthwith without prejudice to or waiver or surrender of any right to claim a larger sum by proceeding before an appropriate tribunal, but subject to the obligation imposed by this section to refund an amount equal to the difference between such payment and the damages subsequently assessed by such tribunal if such offer is accepted as a payment pro tanto and such payment shall prove to be in excess of the damages subsequently assessed by such tribunal. At the election of the person accepting such offer, acceptance thereof may be either in settlement as aforesaid or as such payment pro tanto. After payment of such offer or tender of such payment, no interest shall be recovered, except upon such amount of damages as shall, upon final adjudication, be in excess of the amount of such offer; provided, that all taxable costs accruing subsequently to such offer shall be recoverable by the petitioner in all cases, except as provided in section thirty-eight.

In the event that a payment pro tanto shall prove to be in excess of damages subsequently assessed by an appropriate tribunal, the petitioner shall be ordered by a proper decree to refund to the body politic or corporate an amount equal to the difference between the payment pro tanto and the damages subsequently assessed, plus costs and interest at the rate of six per cent per annum from the date as of which damages were assessed.

§8B. Time for Vacation of Dwellings

No person in possession of property which has been taken under the provisions of this Chapter shall be required to vacate any portion of such property which is being used by him as a

dwelling place or place of business at the time the order of taking is made until four months after notice of such taking has been given to him in accordance with the provisions of section seven C.

No tenant or lessee in possession of property which has been taken under the provisions of this chapter, but who is not entitled to notice of such taking under the provisions of section seven C, shall be required to vacate any portion of such property which is being used by him as a dwelling place or place of business at the time the order of taking is made until four months after notice of such taking has been given him in writing by certified mail, by personal service, or by leaving an attested copy thereof at his last and usual place of abode, if he is a resident of the commonwealth, or at the portion of the property taken which is so used by him.

§9. Injuries to Realty Caused by Improvements Not Constituting a Taking

When injury has been caused to the real estate of any person by the establishment, construction, maintenance, operation, alteration, repair or discontinuance of a public improvement which does not involve the taking of private property, and he is entitled to compensation by law for such injury, if such establishment, construction, maintenance, operation, alteration, repair or discontinuance was effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law, the damages shall be awarded, determined and collected and notice of the order shall be given in the same manner as if there had been a taking of property on behalf of such body politic or corporate under section one. In case such establishment, construction, maintenance, operation, alteration, repair or discontinuance is an improvement for which betterments may be assessed, such vote or order shall state whether betterments are to be assessed therefor. The damages shall be assessed as of the date when the vote or order is adopted, but the right to damages shall not vest and the damages shall not be paid until the work which caused the injury has been completed, or until the public improvement which has been discontinued has ceased to be open to public use, or, in the case of injury to any water, source of water or flowage right, until the water is actually withdrawn or diverted, and if the order does not go into effect, or is rescinded or altered, only so much of the damages shall be paid as has been actually sustained.

§10. Damages for Injuries to Property Caused by Acts in Pais

When the real estate of any person has been taken for the public use or has been damaged by the construction, maintenance, operation, alteration, repair or discontinuance of a public improvement or has been entered for a public purpose, but such taking, entry or damage was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law, or when the personal property of any person has been damaged, seized, destroyed or used for a public purpose, and by such taking, damage, entry, seizure, destruction or use he has suffered an injury for which he is entitled to compensation, the damages therefor may be recovered under this chapter. If the injury was caused by or on behalf of the commonwealth or of a county, city, town or district, the officer or board of officers under whose direction or control the injury was caused shall award the damages upon the petition of any person entitled thereto. If the injury was caused by a railroad corporation, the county commissioners of the county in which the property taken, damaged, entered upon, seized, destroyed or used was located, and, if the injury was caused by a private corporation other than a railroad, the aldermen of the city or the selectmen of the town in which such property was located, shall award the damages upon the petition of any person entitled thereto or of the corporation liable therefor. In case of a specific taking, entry, seizure or other act causing destruction or damage or depriving the owner of the use of his property permanently or for a definite period of time the damages shall be assessed as of the date of such taking, entry, seizure or other act and the right thereto shall vest on such date and a petition for an award of damages therefor under this section may be filed within one year thereafter; otherwise damages shall be assessed with respect to any parcel of property as of the date when such property was first injuriously affected, the right thereto shall vest upon the completion of the public improvement which caused the injury, and a petition for an award of damages therefor under this section may be filed within one year after such completion.

§10A. Procedure for Payment of Damage; Enforcement of Compliance; Effect of Noncompliance

Compliance with the provisions of sections six, seven, seven A, seven B, seven C, seven D, eight A, nine, ten and thirty-six A may be enforced against any person having a duty of compliance therewith by writ of mandamus issued upon the petition of any person adversely affected by noncompliance therewith. The body politic or corporate on behalf of which the taking was made shall be joined in any such petition, and the petitioner may recover therefrom in the same proceeding damages sustained by reason of such noncompliance, with costs.

Notwithstanding the foregoing provisions, noncompliance with said sections six, seven, seven A, seven B, seven C, seven D, eight A, nine and ten shall not affect the validity of the proceedings under this chapter.

§11. Land Lying in More Than One Governmental Unit; Petition for Award of Damages

If a single parcel of land taken or injured by a private corporation lies in more than one county or in more than one town, a petition for an award of damages under section seven may be made to the appropriate board of officers of either of such counties or of either of such towns. The board of officers to whom petition is first made shall have exclusive jurisdiction thereof, and shall award said damages as though the land lay entirely in one county, or in one town. If land injured by a public improvement lies outside the commonwealth, the petition may be made to the board which would have jurisdiction if it lay in the same county, or in the same town, as such public improvement.

§12. Measure of Damages

The damages for property taken under this chapter shall be fixed at the value thereof before the recording of the order of taking, and in case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made; and there shall be deducted the benefit accruing to the part not taken unless it was stated in the order of taking that betterments were to be assessed. In determining the damages to a parcel of land injured when no part of it has been taken, regard shall be had only to such injury as is special and peculiar to such parcel, and there shall be deducted the benefit accruing to such parcel, unless it was stated in the order of taking, or if there was no taking in the order for the establishment, construction, alteration, repair or discontinuance of the public improvement which caused the injury, that betterments were to be assessed. Whenever the title or interest taken is such that the property will be exempt from taxation so long as it is held and used for the purposes for which it is taken, the damages for the taking shall include an amount separately determined and stated which shall be estimated to be equal to that portion of the tax assessed upon the property in the year it is taken which, if the tax were apportioned pro rata according to the number of days in such year, would be allocable to the days ensuing after the taking.

§13. Buildings and Trees on Land Taken

If there are trees upon or structures affixed to the land taken which are not included in the taking, the owner may remove the same, but the damages shall include the value thereof, so far as they enhance the value of the land, and the value thereof for purposes of removal shall be deducted from the damages. If part of a parcel to which structures are affixed is taken, the damages shall include the value of all structures upon such parcel so far as they enhance the value of the land, deducting therefrom the value of all structures or parts thereof left standing on the part not taken, and if the taking did not include the structures, the value for purposes of removal of the structures upon the part taken. If the owner of trees upon land taken refuses or neglects to remove them within the time specified in the order of taking, he shall be deemed to have relinquished his rights thereto. If the owner of structures upon land taken refuses or neglects to remove them within the time speci-

fied in the order of taking, the officers having the direction and control of the public improvement in connection with which the taking was made shall sell such structures at public auction, after five days' notice of such sale, and hold the proceeds for the benefit of such owner, and the expenses of such sale shall be deducted from the owner's damages; but if such property is of less value than the estimated expense of such sale no sale need be made. In that case, or if at the sale no person bids for such property, the owner thereof shall be held to have relinquished his right thereto. If the owner of personal property lying upon land taken refuses or neglects to remove it after reasonable notice in writing from the officers having the direction and control of the public improvement in connection with which the taking was made, he shall be held to have relinquished his right thereto.

§14. Petition to Superior Court

A person entitled to an award of his damages under this chapter or the body politic or corporate bound to pay the same, whether a petition has or has not been filed or award made under section six, seven, nine or ten, may petition for the assessment of such damages to the superior court of the county in which the property taken or injured was situated. If a single parcel of land so taken or injured lies in more than one county, the petition may be filed in the superior court of either such county, and the court in which such petition is first filed shall have exclusive jurisdiction thereof and shall assess damages as though the land lay entirely in one county; provided, that if a petition for damages has previously been filed under section eleven, the petition to the superior court shall be filed in the same county. If the land injured lies outside the commonwealth, such petition shall be filed in the superior court of the county in which the public improvement which caused the injury is situated.

§15. Repealed, 1936

§16. Time of Filing Petition

A petition for the assessment of damages under section fourteen may be filed within two years after the right to such damages has vested; but any person, including every mortgagee of record, whose property has been taken or injured, and who has not received notice under section eight or otherwise of the proceedings whereby he is entitled to damages at least sixty days before the expiration of such two years, may file such petition within six months after the taking possession of his property or the receipt by him of actual notice of the taking, whichever first occurs, or, if his property has not been taken, within six months after he first suffers actual injury in his property.

§17. Time for Filing Petition When Original Proceedings Quashed

If a person petitions for an award or assessment of his damages within the time limited by law, or is a party to such petition by another person, and the petition is quashed, abated or otherwise avoided or defeated for any inaccuracy, irregularity or matter of form, or if, after verdict for such petitioner or other party, the judgment is arrested or reversed on a writ of error, or the proceedings are quashed on certiorari, such petitioner or other party may begin such proceedings anew within one year after such abatement, reversal or other determination.

§18. Time for Filing Petition When Validity of Taking is Contested

If a suit, in which the right of a body politic or corporate to effect a particular public improvement or to make a particular taking is drawn in question, is brought within the time for filing a petition to the proper tribunal for an award or assessment of the damages caused by such improvement or taking, or within six months after the determination of an earlier suit involving the same question, brought within the time for filing such petition, which failed for want of jurisdiction, defeat of form or other like cause not decisive of the merits of the controversy, the petition may be filed within six months after the final determination of such suit.

§19. Time For Filing Petition If Improvement Is Delayed By Law

If the time for locating or constructing a public improvement by a private corporation shall be extended by statute, all unsettled claims against the corporation for damages to land shall be revived, and the claimants for such damages may petition to the proper tribunal within one year after the taking effect of such statute. This section shall not apply to cases in which, by reason of a defect in the original location of a public improvement already constructed, there has been a new location thereof.

§20. Petition by Guardian, Conservator or Trustee

If damages may be recovered under this chapter for the taking of or injury to property of a person under guardianship or conservatorship or property held in trust, the guardian, conservator or trustee may petition for and recover, and may release all such damages in like manner as if the land or other property were held in his own right.

§21. Procedure on Death of Person Entitled to Damages

If a person who is entitled to petition for an award or assessment of his damages under this chapter dies without filing such petition within the time limited therefor, his executor or administrator may within one year from the date of his appointment file such petition in the same manner and with the same effect as if filed by the deceased in his lifetime.

§22. Pleading and Procedure

A petition brought under section fourteen shall name all parties adversely interested known to the petitioner, and process shall issue and service be made as in suits in equity. Any defence to the petition not relating to the amount of damages must be pleaded within thirty days after the return day of the subpoena; but no answer relating solely to the amount of damages shall be filed by any party and no person shall be defaulted for failure to enter an appearance. The trial shall be by the court unless one of the parties within the time prescribed in actions at law files a notice that he desires a trial by jury; and the court may appoint an auditor. Interrogatories may be filed with the same effect as in actions at law. In case of trial by jury, if either party requests it the jury shall view the premises. Judgment shall be entered and execution issued as in actions at law; and when the commonwealth is liable for damages the amount found due shall be certified and paid under section three A of chapter two hundred and fifty-eight.

§23. Petition of persons Holding Different Interests in Same Property

If joint tenants, or tenants in common, or other persons having joint or several estates or interests in a single piece of property sustain damages in such property which are recoverable under this chapter, they may join in any petition to recover the damages thereby incurred, or any one or more of them may petition for his or their damages, subject to sections twenty-four to thirty-three, inclusive.

§24. Petition of Tenant for Life or Years and Remaindermen

If a tenant for life or for years and the remainderman or revisioner sustain damages which are recoverable under this chapter, by the taking of their property by eminent domain or by injury thereto under authority of law, or if property so taken or injured is encumbered by a contingent remainder, executory devise or power of appointment, entire damages shall be assessed without apportionment thereof, and shall be paid to, or be recoverable by, any person whom the parties may appoint, and be held in trust by him for their benefit according to their respective interests. The trustee shall, from the income thereof, pay to the revisioner or remainderman the value of any annual rent or other payment which would, but for such damages, have been payable by the tenant, and the balance thereof to such tenant during the period for which his estate was limited, and upon its termination, he shall pay the principal to the revisioner or remainderman.

§25. Damages Accruing to Life Tenants; Remaindermen, etc., to be Placed in Trust

The amount so to be placed in trust shall include only the damages assessed to the whole property; and any damage special to a separate estate therein, and all interest or other earnings which accrue between the taking and the receipt by the trustee of the damages to the whole property, shall be awarded in the same proceedings separately.

§26. Trustees for Persons Under Legal Disability; Appointment; Bond

If a person having an interest in such property is, by reason of legal disability, incapable of choosing a trustee, or is unascertained or not in being, or if the parties cannot agree upon a choice, the probate court of the county in which the property is situated shall, upon application of the board of officers of the body politic or corporate whose duty it is to award the damages, or of any person interested or of any other person, acting in behalf of such persons, whether in being or not, as may by any possibility be or become interested in said property, appoint a trustee, who shall give to the judge of probate a bond with such sureties and in such sum as the judge may order, conditioned for the faithful performance of his duties.

§27. Persons Holding Unusual Interests; Right to Petition

If there are several parties, who have several estates in the same property at the same time, other than the estates and interests for which provision is made in section twenty-four and the property is taken in whole or in part or receives injury for which damages are recoverable under this chapter, and one of such parties petitions the superior court to ascertain his damages, the other parties may become parties to the proceedings under such petition, and the damages of all of them may be determined together, in the manner provided in the three following sections.

§28. Notice to Holders of Different Interests

Upon such petition, the court may order the petitioner to give notice thereof to all the other parties interested, by serving each of them with an attested copy of such petition and the order thereon fourteen days before the next return day, in order that the other parties may appear and become parties to the proceedings under the petition.

§29. Award to Persons Holding Different Interests; Apportionment

If, on such petition, the court or jury find any of the parties entitled to damages, there shall first be found and set forth the total amount of damages sustained by the owners of such property, estimating the same as an entire estate and as if it were the sole property of one owner in fee simple; and such damages shall then be apportioned among the several parties who are found to be entitled thereto, in proportion to their several interests and to the damages sustained by them, respectively, and such apportionment shall be set forth in the finding or verdict; and if it is found that any party has not sustained damage, it shall be set forth in the finding or verdict that he is awarded no damages. The finding or verdict shall be conclusive upon all parties interested who have become parties to the petition.

§30. Appointment of Guardian Ad Litem or Trustee

If it appears in any proceedings under the seven preceding sections that an interest in such property is unrepresented by reason of a contingency or other cause by which the owner thereof is unknown or cannot then be ascertained, or because of the disability of such owner, a guardian ad litem to represent such interest may be appointed by the tribunal in which such proceedings are pending; or the judge of probate for the county in which such proceedings are pending may, upon petition of any party in interest, after such notice as he may order to all persons who, or whose issue unborn may be or may become interested in such apportionment, appoint a trustee, who, upon giving such bond as the judge of probate requires, shall represent such interest, and shall receive, manage and invest any money receivable on account thereof, for the benefit of the parties entitled thereto, and

shall pay the principal and interest thereof to such parties when entitled thereto. Such guardian ad litem or trustee shall be allowed such costs, including counsel fees, as may be ordered by the court in which such proceedings are finally determined, to be paid from the damages apportioned to the interest which he represents.

§31. Petition by Tenant in Possession of Encumbered Property

The tenant in possession of property which is encumbered by a contingent remainder, executory devise or power of appointment may, subject to section sixteen, petition the superior court for the assessment of damages; and if he fails so to petition within the first six months of the year allowed by said section, a trustee under section twenty-four or section twenty-six may within the remaining six months thereof petition therefor.

§32. Mortgaged Land; Procedure

If property which is taken in whole or in part by eminent domain or receives injury, for which damages are recoverable under this chapter, is mortgaged, both the mortgagor and the mortgagee, in addition to their rights under the mortgage, shall have the same powers, rights and privileges, and be subject to the same liabilities and duties, as are provided in this chapter for owners of property so taken or injured, and all petitions for the award or assessment of such damages shall state all mortgages which are known by the petitioner to exist upon the property. Mortgagors and mortgagees may join in any such petition, or become parties to any proceedings for the award or assessment of damages under this chapter, and, if the petition is filed by a mortgagor or mortgagee of property taken or injured, the tribunal to which it is presented shall order the petitioner to give notice thereof to all other mortgagors or mortgagees of the same property by serving on each of them, fourteen days at least before the time of hearing, an attested copy thereof and of the order thereon, that they may become parties to the proceedings.

§33. Apportionment of Damages Between Mortgagor and Mortgagee

If mortgagors or mortgagees begin or become parties to such proceedings, entire damages shall, upon final judgment, be assessed for the property taken, and such portion thereof as is equal to the amount then unpaid thereon shall be ordered to be paid to every mortgagee who is a party, in the order of his mortgage, and the remainder to the mortgagor; and separate judgment shall be entered accordingly for each mortgagee, who shall hold his judgment in trust, first, with any proceeds realized thereon, to satisfy his mortgage debt, and, after such debt is in any way satisfied, to assign the judgment or pay over any remainder of the proceeds to the mortgagor or other person entitled thereto.

§34. Request for Quick Trial

Upon the filing of a petition under section fourteen by or against the commonwealth or a county, city, town or district or any other legal entity which is authorized under the provisions of any general or special law to take property in whole or in part or of any interest therein by eminent domain, the court shall, at the request of any party to the proceeding, advance the same so that it may be heard and determined with as little delay as possible.

§35. Evidence of Assessed or Fair Market Value of Property; Admissibility

The valuation made by the assessors of a town for the purpose of taxation for the three years next preceding the date of the taking of or injury to real estate by the commonwealth or by a county, city, town or district under authority of law may, in proceedings, brought under section fourteen to recover the damages to such real estate, the whole or part of which is so taken or injured, be introduced as evidence of the fair market value of the real estate by any party to the suit; provided, however, that if the valuation of any one year is so introduced, the valuations of all three years shall be introduced in evidence.

§35A. Apportionment of Taxes

In case of a trial by jury in a proceeding brought under section fourteen, the amount, if any, to which the petitioner is entitled by reason of the tax assessed upon the property in the year in which it was taken, as provided in section twelve, shall be separately determined by the court, either upon stipulation of the parties or upon evidence received, after the jury has rendered its verdict.

§36. Discontinuance of Petition

No petition brought under section fourteen shall be discontinued except by leave of court or by agreement of all the parties thereto; and any party thereto may prosecute the same.

§36A. Payment of Damages After Exhaustion or Waiver of Right to Appeal

The body politic or corporate against which an award is made under section seven, nine or ten, or against which a judgment is entered under section fourteen, shall, within thirty days after all rights of appeal therefrom have been exhausted or waived, make payment in accordance with such award or judgment.

§37. Interest on Award of Damages

Damages under this chapter shall bear interest at the rate of six per cent per annum from the date as of which they are assessed until paid, except that an award shall not bear interest after it is payable unless the body politic or corporate liable therefor fails upon demand to pay the person entitled thereto. Interest shall be added by the clerk of the court to the damages expressed in a verdict, finding, or order for judgment on an auditor's report. A judgment, whether against the commonwealth or any other body politic or corporate, shall bear interest at the rate of six per cent per annum from the date of the entry of such judgment to and including the last day of the month prior to the month in which satisfaction thereof is paid.

§38. Costs.

In all proceedings before county commissioners under this chapter, section eighteen of chapter thirty-four shall be applicable. In all proceedings brought under section fourteen, if a petition is filed after an award of damages has been made and the damages are increased, or if no award has been made and the petitioner is found to be entitled to damages, he shall recover costs, which shall be taxed as in actions at law; otherwise he shall pay costs.

§39. Settlement and Tender; Interest

Whenever damages may be recovered under this chapter, the body politic or corporate liable for such damages may after the right to such damages has become vested effect such settlement of the damages with the person entitled thereto as it may deem to be for its best interests, and it may as one of the terms of the settlement of a claim for damages growing out of the proceedings in respect of which betterments have been or are to be assessed agree in writing with the owner of the land assessed to assume such betterments. Every settlement under this section shall be in writing and in full satisfaction of all damages for such taking with interest thereon and taxable costs, if any. After approval of such settlement by the board of officers who made the taking for which damages are sought, or after acceptance of an offer of such settlement by the person seeking such damages, whichever occurs later, the amount of such settlement shall bear interest at the rate of six per cent per annum from the date of such settlement to and including the last day of the month prior to the month in which payment thereof is made or tendered.

§40. Taking by Private Corporations; Security for Damages

Before a taking is made or injury inflicted by a private corporation for which damages may be recovered under this chapter, such corporation shall give to the board of officers by whom

such damages are to be awarded security to their satisfaction for the payment of all damages and costs which may be awarded by them or by the court for the land or other property taken or injured; and if, upon petition of the owner and notice to the adverse party, any security taken appears to them to have become insufficient, they shall require the corporation to give further security to their satisfaction. If the corporation fails to comply with this section any person entitled to such damages may treat the taking of his property or the proceedings by which the right to inflict injury thereon was acquired as void and any interference by such corporation with the use and enjoyment of his property as unlawful.

§41. Finality of Award; Remedy for Collection

If no petition under section fourteen is filed within the time limited, the award of damages shall be final and the amount thereof shall be paid upon demand, and if not so paid may be recovered in an action of contract.

§42. Remedies to Enforce Payment by Private Corporation

If a private corporation has erected or laid poles, wires, pipes, rails or other structures in a public way, for the construction, operation or maintenance of which damages may be recovered from such corporation under this chapter by the owners of any interest in land abutting upon such way, and such corporation does not pay such damages to an owner of any such interest after they have been finally determined and within thirty days after demand, the mayor of the city or the selectmen of the town in which such structures are located may, upon request of such owner, remove all the structures of such corporation from that portion of the public way upon which the land in which such person has an interest abuts, first leaving a written statement at the office of such corporation in such city or town of the time when and place from which they intend to remove such structures, not less than forty-eight hours prior to such removal. If such corporation has no office in such town, such notice shall be deposited in the post office, postage prepaid, and directed to such corporation at its principal office in the commonwealth. The town so removing any such structures may recover the expense thereof of such corporation. This section shall not prevent such owner from collecting the damages assessed.

§43. Right Less Than Fee; Effect of Abandonment on Award of Damages

When any easement or other right less than the fee which has been taken by eminent domain has been abandoned in accordance with law before the damages accruing from such taking have been finally determined, the fact of such abandonment may be considered in reduction of damages in any proceedings under this chapter for the award or assessment thereof.

§44. Taking by United States

If the agents of the United States and the persons owning or interested in any property which is required for any purposes for which the United States is authorized to take property by eminent domain cannot agree upon the price to be paid for the interest of such persons therein, the United States may file a petition in the superior court for the county in which such property lies, praying for the condemnation of such property. Such petition shall contain a description of the property to which it relates, sufficiently accurate for identification, and a statement of the purpose for which it is sought to be taken. If the court, after notice to all parties interested, finds that the United States has the right to take such property by eminent domain, it shall determine the value thereof in accordance with this chapter, so far as it is applicable. If such value with costs and reasonable expenses to be taxed by the court is, within thirty days after final determination thereof, paid or tendered to said owners or parties interested, or in case of their neglect or refusal to receive the same, if it is paid to the commonwealth for their use and subject to their order, a decree of condemnation shall be entered by the court, and, if the property taken consists of real estate, a copy of the decree shall be recorded in the registry of deeds of every county or district in which said property or any of it lies, and the fee of said property shall thereupon vest in the United States.

§44A. Tax Liens on Realty Taken

If real estate taken in whole or in part by eminent domain was at the time of said taking subject to any lien for taxes, assessments or other charges, which is extinguished by such taking, and if the collector of taxes of the town in which such real estate is located gives written notice of a claim of the amount covered by such lien to the body politic or corporate, on behalf of which such taking was made, prior to the payment of any award of damages for such taking or to the entry of judgment therefor, said collector shall be entitled to be paid such amount before any payment of damages for such taking is made to any other party; and any amount so payable on account of such taxes, assessments or other charges shall be deducted from the amount of such damages otherwise payable.

§45. Applicability of Chapter

No real estate shall be taken for public use by the formal vote or order of any board of officers except under this chapter or chapter eighty A, and no damages shall be assessed for the taking or seizure of property for a public purpose or for injury thereto by authority of law, except under this chapter or chapter eighty A, nothwithstanding any general or special act hitherto enacted; provided, that nothing contained in this chapter or in chapter eighty A shall be construed as amending or in any way affecting chapter two hundred and fifty-three.

COMMONWEALTH OF MASSACHUSETTS

CHAPTER 80
BETTERMENTS

§1. Assessment of Cost of Public Improvements

Whenever a limited and determinable area receives benefit or advantage, other than the general advantage to the community, from a public improvement made by or in accordance with the formal vote or order of a board of officers of the commonwealth or of a county, city, town or district, and such order states that betterments are to be assessed for the improvement, such board shall within six months after the completion of the improvement determine the value of such benefit or advantage to the land within such area and assess upon each parcel thereof a proportionate share of the cost of such improvement, and shall include in such cost all damages awarded therefor under chapter seventy-nine; but no such assessment shall exceed the amount of such adjudged benefit or advantage. The board shall in the order of assessment designate as the owner of each parcel the person who was liable to assessment therefor on the preceding January first under the provisions of chapter fifty-nine.

§2. Assessment Order; Plan and Estimate; Recordation

An order under section one which states that betterments are to be assessed for the improvement shall contain a description sufficiently accurate for identification of the area which it is expected will receive benefit or advantage, other than the general advantage to the community, from such improvement, and shall refer to a plan of such area, and shall contain an estimate of the betterments that will be assessed upon each parcel of land within such area; and such order, plan and estimate shall be recorded, within ninety days from the adoption of the order, or from the acceptance by a town of the laying out, relocation or alteration of a way in case such acceptance is required before the establishment thereof, in the registry of deeds of every county or district in which the benefited area is situated. No betterments shall be assessed for such improvement unless the order, plan and estimate are recorded as herein provided, nor upon any parcel of land not within such area, nor for a greater amount than such estimate.

§3. Surrender of Land Assessed

An owner of land abutting on a public improvement and liable to assessment therefor under this chapter may give notice in writing to the board, within three months after the award of damages is made, that he elects to surrender his land; and if said board adjudge that the public convenience and necessity require the taking of such abutting estate for the improvement named, they may take the whole thereof, and shall thereupon estimate its value, excluding the benefit or advantage accruing from such improvement; and such owner shall convey the estate to the body politic or corporate on behalf of which the assessment was made and may recover therefrom in contract the value so estimated. The commonwealth, county, city, town or district may sell any portion of said land which is not needed for such improvement.

§4. Collection

Within a reasonable time after making the assessment the board shall certify to the assessors the list of assessments upon land in each town who shall forthwith commit such assessments with their warrant to the collector of taxes thereof, and he shall forthwith send notice in ac-

cordance, except as to the date of notice, with section three of chapter sixty, to the person designated under section one as the owner of each parcel assessed, and any demand for the payment of such assessment shall be made upon such person. Except as otherwise herein provided, the collector shall have the same powers and be subject to the same duties with respect to such assessments as in the case of the annual taxes upon real estate, and the law in regard to the collection of the annual taxes, to the sale of land for the non-payment thereof and to redemption therefrom shall apply to assessments made under this chapter, so far as the same are applicable; but the owner of land assessed shall not be personally liable for the assessment thereon. Every collector of taxes receiving a list and warrant from the assessors shall collect the assessment therein set forth, and at such times as the assessors shall direct shall pay over to the treasurer of the body politic on behalf of which the assessment was made the amounts collected by him.

§5. Petition for Abatement; Filing, etc.

The owner of any real estate upon which betterments have been assessed may, within six months after notice of such assessment has been sent out by the collector, file with the board a petition for an abatement thereof, and the board shall grant such abatement as may be necessary to make such assessment conform to section one. Such petition may be filed with the clerk or secretary of the board, or delivered by mail or otherwise at their office. The board shall within ten days after their decision upon the petition give written notice thereof to the petitioner. If an assessment is abated by the board the assessment so determined shall stand as the assessment upon the land, and if it has not been paid shall be reimbursed by the body politic on behalf of which it was assessed to the amount of the abatement allowed, with interest at the rate of six per cent per annum from the time of payment.

§6. Filing Petition; Time Limitation; Extension

If a suit in which the validity of an assessment is drawn in question is brought within the time for filing a petition to the board for the abatement thereof or within six months after the determination of an earlier suit involving the same question, brought within the time for filing such petition, which failed for want of jurisdiction, defect of form or other like cause not decisive of the merits of the controversy, the petition may be filed within six months after the final determination of such suit.

§7. Appeal to Superior Court

A person who is aggrieved by the refusal of the board to abate an assessment in whole or in part may within thirty days after notice of their decision appeal therefrom by filing a petition for the abatement of such assessment in the superior court for the county in which the land assessed is situated. If a single parcel of land so assessed lies in more than one county the petition may be filed in the superior court for either such county, and the court in which such petition is first filed shall have exclusive jurisdiction thereof.

§8. Death of Person Entitled to Petition for Abatement

If a person who is entitled to petition for an abatement under this chapter dies within the time limited for such petition without having filed the same, his executor, administrator, heir or devisee, if interested, may, within one year after his interest vests, file such petition in the same manner and with the same effect as if filed by the deceased in his lifetime.

§9. Trial Procedure

Upon the filing of a petition under section seven, process shall issue and service be made as in suits in equity upon the body politic on behalf of which the assessment was made. Any defence to the petition not relating to the amount of the assessment must be pleaded within thirty days of the return day of the subpoena; but no answer relating solely to the amount of the assessment shall be

filed, and there shall be no default for failure to enter an appearance. The trial shall be by the court unless one of the parties within the time prescribed in actions at law files a notice that he desires a trial by jury; and the court may appoint an auditor. Interrogatories may be filed with the same effect as in actions at law. The court, at the request of any party, shall advance the petition so that it may be heard and determined with as little delay as possible. In case petitions have been filed for the assessment of damages and for the abatement of betterments with respect to the same parcel of land and the same public improvement, the petitions shall be tried together. In case of trial by jury, if either party requests it the jury shall view the premises. If the assessment is not reduced the respondent shall recover costs and an execution shall issue therefor as in actions at law; but if the assessment is reduced the petitioner shall recover judgment for costs, and the assessment so determined shall stand as the assessment upon the land, and if it has not been paid shall be collected in the manner provided for an original assessment. If the assessment has been paid judgment shall be entered for the petitioner for the amount of the reduction, with interest at the rate of four per cent per annum from the time of payment.

§10. Appeal to County Commissioners

A person who is aggrieved by the refusal of a board of officers of a city, town or district to abate an assessment may, instead of pursuing the remedy provided by section seven, appeal within the time limited therein to the county commissioners of the county in which the land assessed is situated. The person so appealing shall within ten days after the filing of said appeal, give written notice thereof to such city, town or district. Such notice may be given by mailing a copy of the appeal by registered mail, postage prepaid, to the board which made the assessment or to the clerk of such city, town or district. The county commissioners shall hear the parties, and shall have the same powers and duties with respect to the abatement of such assessment as the board by which it was assessed, and may make an order as to costs. The decision of the county commissioners shall be final.

§10A. Petition for Abatement; Procedure on Failure of Board to Act

If the board with which a petition for the abatement of an assessment has been duly filed in accordance with the provisions of section five fails to act upon said petition within four months of the date of the filing of such petition, the petition shall be deemed to be denied, and the petitioner shall have the right within sixty days after the expiration of said four months to appeal as if the board had in fact denied the said petition; provided, that if the assessment has been paid, no appeal shall be taken after the expiration of ten months from the time of payment.

§11. Contribution by Lessee; Rights and Remedies of Lessee

If an assessment is made upon land the whole or part of which is leased, the owner shall pay the assessment, and may collect of the lessee an additional rent for the portion so leased equal to ten per cent per annum on that proportion of the amount paid which the value of the leased portion bears to that of the whole estate, after deducting from the whole amount any money received for damages to such land in excess of what he has necessarily expended thereon by reason of such damages. A lessee aggrieved by the imposition of this burden may, within six months from the time demand is made upon him for such additional rent, file a petition in the superior court for the county in which the land is situated, to determine the proportion of the assessment which he ought to bear, and the proportion determined upon the petition shall be substituted for the proportion provided by this section. If such proportion is reduced the lessee shall recover costs from the owner; otherwise the owner shall recover costs from the lessee.

§12. Lien Status of Assessment; Duration of Lien

Assessments made under this chapter shall constitute a lien upon the land assessed. The lien shall take effect upon the recording of the order stating that betterments are to be assessed for the improvement. Except as otherwise provided, such lien shall terminate at the expiration of two years

from October first in the year in which the assessment is first placed on the annual tax bill under section thirteen or, if an assessment has been apportioned, from October first in the year in which the last portion is so placed upon the annual tax bill, whichever is later, if in the meantime in either case the estate has been alienated and the instrument alienating the same has been recorded. If there is no recorded alienation within such period, the lien shall continue until there is a recorded alienation. If the validity of the assessment made under this chapter is called in question in any legal proceeding to which the board which made the assessment or the body politic for the benefit of which it was made is a party, instituted prior to the expiration of the lien therefor, the lien shall continue until one year after the validity of the assessment is finally determined, even though an alienation be recorded in the meantime. If at any time while a lien established by this section is in force, a sale or taking cannot in the opinion of the collector be legally made because of any federal or state law or because of any injunction or other action of, or proceeding in, any federal or state court or because of the action of any administrative body, the lien shall, if the statement provided for in section thirty-seven A of chapter sixty is filed, continue as provided in said section thirty-seven A, subject, however, to any lawful action under any paramount authority conferred by the constitution or laws of the United States or the constitution of the commonwealth. If the time for payment of an assessment is extended under section thirteen A or under any general or special law, the lien shall, if the statement provided for in section thirty-seven A of chapter sixty is filed, continue as provided in said section thirty-seven A. A lien under this section may be dissolved by filing for record in the registry of deeds of the county or district where the land subject to the lien lies a certificate, in a form approved by the commissioner of corporations and taxation, from the collector of taxes that the assessment, constituting the lien, together with any interest and costs thereon, has been paid or legally abated. The collector of taxes shall charge two dollars for each certificate so issued, and the money so received shall be paid into the town treasury.

§13. Apportionment and Reapportionment

Assessments made under this chapter shall bear interest at the rate of four per cent per annum from the thirtieth day after the assessments have been committed to the collector. The assessors shall add each year to the annual tax assessed with respect to each parcel of land all assessments, constituting liens thereon, which have been committed to the collector prior to January second of such year in which such assessments will first appear on the annual tax bill, the board of assessors may, and at the request of the owner of the land assessed shall, apportion all assessments or unpaid balances thereof made under this chapter into such number of equal portions, not exceeding twenty, as is determined by said board or as is requested by the owner, as the case may be, but no one of such portions shall be less than five dollars; provided, that, if an original assessment exceeds one hundred dollars and has been placed upon the annual tax bill, or has been apportioned into a number of portions less than twenty and the first portion has been placed upon an annual tax bill, the board of assessors may in its discretion, upon a request for the apportionment of such assessment into twenty portions made by the owner prior to a sale or taking of the land for the non-payment of such assessment or portion and upon payment of any necessary intervening charges and fees and such portions of such assessment as would have become due and payable if the request for apportionment had been seasonably made, apportion or reapportion the said assessment as aforesaid, and if any other tax or assessment constituting a lien upon the parcel to which the assessment so apportioned or reapportioned relates remains unpaid after such apportionment or reapportionment, the collector may institute proceedings anew for the sale or taking of such parcel at any time prior to the expiration of the lien or of a period of twenty days after such apportionment or reapportionment, whichever is the later. The assessors shall add one of said portions, with interest on the amount remaining unpaid from thirty days after the commitment of the original assessment to the collector to the date when interest on taxes becomes due and payable, to the first annual tax upon the land and shall add to the annual tax for each year thereafter one of said portions and one year's interest on the amount of the assessment remaining unpaid until all such portions shall have been so added; all assessments and apportioned parts thereof, and interest thereon as herein provided, which have been added to the annual tax on any parcel of land shall be included in the annual tax bill thereon. After an assessment

or a portion thereof has been placed on the annual tax bill, the total amount of said bill shall be subject to interest under and in accordance with the provisions of section fifty-seven of chapter fifty-nine.

Notwithstanding a prior apportionment, the assessors, upon written application of the owner of the land assessed, shall order that the full amount, or any portion thereof, remaining unpaid of any assessment be payable forthwith and shall commit said amount, together with interest thereon from thirty days after the commitment of the original assessment if no portion has been added to a tax levy, or if a portion has been added to a tax levy, then with interest from October first of the year to which the last portion has been added, with their warrant therefor, to the collector for collection. If a part of a prior apportioned assessment is ordered to be payable forthwith, the payments shall be credited to the terminal or final years so as to reduce the period of payment.

§13A. Land Devoid of Structures; Extension of Time for Payment of Assessments

The board making the order for the assessment of any betterment upon land which is not built upon may extend the time of payment of the assessment until it is built upon or for a fixed time; but interest at the rate of four per cent per annum shall be paid annually upon the assessment from the time it was made and the assessment shall be paid within three months after such land is built upon or at the expiration of such fixed time.

§14. Repealed, 1923

§15. Division of Assessed Land.

If land which is subject to a lien for an assessment made under this chapter is subsequently divided by sale, mortgage, partition or otherwise and such division has been duly recorded in the registry of deeds, the board, before the land has been advertised for sale for non-payment of the assessment, may or upon written request of the owner or mortgagee of a portion thereof, accompanied by a plan sufficient for the identification of the division of the whole estate, with the names of the different owners thereof, shall, divide said assessment or the amount thereof remaining unpaid, and the costs and interest accrued thereon, among the several parcels into which said land has been divided, assessing upon each parcel the part of the original assessment remaining unpaid proportionate to the special benefit received by such parcel from the improvement. After such assessment has been so divided, only the part of the assessment, interest and costs assessed upon each parcel shall constitute a lien upon such parcel. At least seven days prior to making such division the board shall send by registered mail to all owners of any interest in the land assessed, whose addresses are known to them, a notice of their intention to make such division and of the time appointed therefor, unless such notice has been waived. A person aggrieved by any action of the board under this section shall have the same remedy as a person aggrieved by the refusal of the board to abate an assessment.

§16. Reassessment

If an assessment is invalid and has not been paid in full or has been paid under such circumstances that it can be recovered back, it may be reassessed by the board in the amount for which the original assessment ought to have been made, at any time before the expiration of two years from the date of the assessment, if the land has in the meantime been alienated; otherwise at any time before the alienation thereof. Such assessment shall be a lien upon any sum paid on account of the original assessment, and to the extent that it is not thereby satisfied shall be a lien upon the land. It shall be collected in the same manner as an original assessment, and shall in all other respects be subject to this chapter.

§17. Application of Chapter

Whenever a formal vote or order for the laying out or construction of a public improvement or for the taking of land therefor, states that betterments are to be assessed, no betterments shall be assessed except under this chapter or chapter eighty A, and all proceedings relating to such betterments shall be as herein or therein provided, notwithstanding any special act hitherto enacted.

MASSACHUSETTS GENERAL LAWS

CHAPTER 81

STATE HIGHWAYS
DEPARTMENT OF PUBLIC WORKS

§7. Acquisition of Land Outside Limits of Existing Highway

If it is necessary to acquire land for the purposes of a state highway outside the limits of an existing public way, the department may take the same by eminent domain on behalf of the commonwealth under chapter seventy-nine. When injury has been caused to the real estate of any person by the laying out or alteration of a state highway, he may recover compensation therefor from the commonwealth under chapter seventy-nine. The mayor, if so authorized by the aldermen, or the selectmen, if so authorized by the town, may stipulate in writing in behalf of the city or town to indemnify and save harmless the commonwealth against all claims and demands for damages which may be sustained by any persons whose property has been taken for, or has been injured by the laying out or alteration of, any highway which the department proposes to lay out and construct or alter as a state highway, and thereupon such city or town shall be liable ultimately for the amount of any verdict against the commonwealth for such damages, and for costs, and the amount thereof may be recovered by the commonwealth in contract.

§7A. Acquisition of Land to Alter Ways Connecting With State Highways

In connection with the laying out, alteration or reconstruction of a state highway, the department may alter or relocate connecting ways as may be necessary. Land or rights in land may be acquired for this purpose by eminent domain under chapter seventy-nine by the department in behalf of the city or town in which the land lies, or in behalf of the commonwealth, at the option of the department. The department may take or acquire by eminent domain under said chapter, easements in land outside the location of limited access state highways, said easements to be taken in behalf of those owners of land abutting said highways, whose rights of access to and egress from their land, and any other rights necessary to make the same available for use, will become inoperative due to the construction of said highway. Control of the land or rights in the land acquired under this section shall not vest in the city or town until such time as the work for which the land or rights in land have been acquired has been completed by said department, except that the city or town shall be responsible for snow and ice control on such portions of the highway as may be opened to traffic prior to final completion or acceptance of the project. Any person whose property has been taken or injured by any action of said department under authority of this section may recover from the commonwealth under chapter seventy-nine such damages therefor as he may be entitled to.

§7C. Limited Access Ways; Acquisition; Definition

If the department determines that public necessity and convenience require that a limited access way shall be laid out, it shall lay out such way in the same manner as state highways. A limited access way is hereby defined to be a highway over which the easement of access in favor of abutting land exists only at such points and in such manner as is designated in the order of laying out. All of the provisions of law in regard to the laying out, relocation, alteration or discontinuance of state highways and to damages therefor shall apply to limited access ways. If a limited access way is laid out in whole or in part in the location of an existing public way, the owners of land abutting

upon such existing public way shall be entitled to recover damages under chapter seventy-nine for the taking of or injury to their easements of access to such public way. No highway, town way or private way shall be laid out by county commissioners, by the selectmen of a town or by the appropriate officer or board of a city which crosses, enters upon or unites with a limited access way, without the consent in writing of the department. In connection with the laying out or alteration of a limited access highway, the department may take in fee or otherwise, by purchase, gift, devise, or by eminent domain under chapter seventy-nine, land or rights in land adjoining the highway location whose right of access has been acquired.

§29A. Laying Out or Altering Ways With Federal Contributions

The department may lay out or alter ways other than state highways in any city or town provided that federal aid may be secured toward the damages sustained, and provided that the mayor of the city or the board of selectmen of the town consents thereto. Land or rights in land may be acquired for this purpose by eminent domain under chapter seventy-nine by the department in behalf of the city or town in which the land lies. Any person whose property has been taken or injured by any action of said department under authority of this section may recover from the commonwealth under chapter seventy-nine such damages therefor as he may be entitled to. For this purpose the department may use any funds which may be available for the purpose of securing federal aid in the construction of highways and may also use any money appropriated for a county, or by a city or town, toward the damages sustained, provided that the county commissioners, selectmen or mayor have agreed in writing to pay the money thus appropriated upon the order of the department.

CHAPTER 82

THE LAYING OUT, ALTERATION, RELOCATION AND DISCONTINUANCE OF PUBLIC WAYS, AND SPECIFIC REPAIRS THEREON

§7. Taking Land or Easement by Eminent Domain; Damages

If it is necessary for the purpose of laying out, altering or relocating a highway, or establishing a building line in connection therewith, to acquire land, or an easement or right therein, the commissioners shall, at the same time that the highway is laid out, altered or relocated, take such land, easement or right by eminent domain under chapter seventy-nine. Any person sustaining damage in his property by the laying out; alteration, relocation or discontinuance of a highway, or by the establishment or discontinuance of a building line, shall be entitled to recover the same under said chapter. If no entry has been made upon land taken for highway purposes, or if the location has for any other cause become void, or if specific repairs which have been ordered are not made, a person who has suffered loss or been put to expense by the proceedings shall be entitled to recover indemnity therefor under said chapter.

§24. Taking by Eminent Domain and Damages

If it is necessary to acquire land for the purposes of a town way or private way which is laid out, altered or relocated by the selectmen, road commissioners or other officers of a town under this chapter, such officers shall, within thirty days after the termination of the town meeting at which the laying out, alteration or relocation of such town way or private way is accepted by the town, acquire such land by purchase or otherwise, or adopt an order for the taking of such land by eminent domain under chapter seventy-nine or institute proceedings for such taking under chapter eighty A. Any person sustaining damage in his property by the laying out, alteration or relocation of a town way or private way shall be entitled to recover the same under said chapter seventy-nine, unless such damage was sustained in connection with a taking made in proceedings instituted under said chapter eighty A, and any person sustaining damage in his property by the discontinuance of a town way or private way or by specific repairs thereon shall be entitled to recover the same under said chapter seventy-nine. If no entry has been made upon land taken under said chapter seventy-nine for the purpose of a town way, or if the location has for any other cause become void, a person who has suffered loss or been put to expense by the proceedings shall be entitled to recover indemnity therefor under said chapter seventy-nine. If a private way is laid out, relocated, altered or discontinued by a town, or if a town makes specific repairs thereon, or if a town way is discontinued, the persons upon whose application such way is laid out, relocated, altered or discontinued or upon whose application specific repairs are made thereon shall, before such way is entered upon for the purposes of construction, or is closed up, give such town security satisfactory to the selectmen that they will indemnify such town for all damages and charges which it is obliged to pay by reason thereof, and all such damages and charges shall be repaid to the town by the persons making such application; provided, however, that in case of the discontinuance of a town way the selectmen may order a part of the damages to be paid by the town. The first sentence of this section shall not apply to cities.

CHAPTER 83

SEWERS, DRAINS AND SIDEWALKS

§4. Highway Drains

The department of public works, county commissioners, and the officers having charge of highways in any city or town may construct ditches or drains for the purpose of properly draining any highway, and may carry water away from any highway and over or through any land as they may deem necessary for public convenience or for the proper care or construction of such highway, and may purchase or take by eminent domain under chapter seventy-nine, on behalf of the commonwealth, county, city or town, such land or interest therein as may be necessary therefor. Such ditches and drains shall be under the control of said officials, who may enter upon any land for the purpose of constructing, repairing or maintaining the same; but they shall not enter upon or construct any ditches, drains or other works or lay any conduits or pipes or discharge any water within the location of any railroad corporation, except at such time and in such manner as they agree upon with such corporation, or, in case of failure so to agree, as may be approved by the department of public utilities. The owner or occupant of land through which any ditch or drain has been constructed under this section may, after securing a permit from the officers having control of the ditch or drain, construct and maintain a bridge over the same. The damages sustained by any person in his property by takings or other acts herein authorized may be recovered under chapter seventy-nine. The department, board or officers who have taken an easement under this section may discontinue or abandon the same by filing for record in the registry of deeds a suitable instrument.

CHAPTER 84
REPAIR OF WAYS AND BRIDGES

§10. Entry Upon Land to Secure and Protect Public Way; Damages

The selectmen or road commissioners may enter upon, use or survey or take by eminent domain under chapter seventy-nine any land they may deem necessary for the purpose of securing or protecting a public way; and any person thereby injured in his property and any owner of land adjoining a way who has sustained damage in his property by an act done for the purpose of repairing the way may recover such damages under chapter seventy-nine.

CHAPTER 87
SHADE TREES

§8. Trees on State Highways

The department of public works, in this chapter called the department, shall have the care and control of all trees, shrubs and growths within state highways, and may trim, cut or remove such trees, shrubs and growths, or license the trimming, cutting or removal thereof. No such tree, shrub or other growth shall be trimmed, cut or removed by any person other than an agent or employee of the department, even if he be the owner of the fee in the land on which such tree, shrub or growth is situated, except upon a permit in writing from the department. Any person injured in his property by the action of the department as to the trimming, cutting, removal or retention of any such tree, shrub or other growth, may recover the damages, if any, which he has sustained, from the commonwealth under chapter seventy-nine.